UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE WIRE HARNESS SYSTEMS ANTITRUST MDL NO. 2311

_____/

STATUS CONFERENCE / MOTION HEARING

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, December 5, 2012

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Detroit, Michigan

Wednesday, December 5, 2012

at about 9:31 a.m.

— — —

(Court and Counsel present.)

THE CASE MANAGER: All rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

The Court calls Automotive Parts Antitrust Litigation.

THE COURT: Why are there so many of you here? I thought by now we would --

THE CASE MANAGER: They have doubled in size, Judge.

THE COURT: It is amazing. Good morning. I'm very sorry about what happened at the door today. I understand some of you were delayed. I know my staff was delayed for quite some time coming through security. I guess that's one thing I didn't think about when we had it on this day -- well, no, tomorrow we will also have immigration coming in, naturalization, although, Bernie, they come in the other door so that shouldn't create more of a problem, but today there was a Grand Jury and there was the Kwame Kilpatrick case

continuing, so I apologize but everybody is here now. Okay.

Let's begin with going over the agenda. On wire harness, who wants to give a status report on that?

MR. FINK: Your Honor, on wire harness for the direct purchaser plaintiffs, Greg Hansel will address the first few products.

THE COURT: Okay.

MR. HANSEL: May it please the Court, good morning, Your Honor. Greg Hansel for the direct purchaser plaintiffs.

This should be a pretty short presentation. One thing that we recommended to the Court in this conference agenda was to take the cases on a part-by-part basis rather than a topic-by-topic basis because it helps us all keep it clear in our head because there are so many parts, if you take the parts one at a time it seems to be more coherent to us.

THE COURT: That's fine.

MR. HANSEL: So the direct cases are fully served in wire harness, as we previously reported, and Shawn Raiter on behalf of the auto dealers will address the auto dealer cases.

THE COURT: All right.

MR. RAITER: Good morning, Your Honor. Shawn Raiter for the auto dealers.

All the defendants are served on behalf of the auto

dealers in wire harnesses as well.

THE COURT: Good. End payor?

MR. PERSKY: Bernard Persky of the Labaton Sucharow firm for the end payors. The end payor cases are fully served, but the plaintiffs are awaiting written confirmation of service on Defendant Tokai Rika Co. Limited, and by fully served so that there be no misunderstanding if we have multiple cases that have been filed on behalf of end payors what we mean is at least one of the constituent cases have served fully -- a defendant has been served in one of the constituent cases so all defendants have been served in at least one of those cases.

THE COURT: So they have not been served with the consolidated amended complaint?

MR. PERSKY: No. What happens after the defendants are all fully served, there will be a service of a consolidated amended complaint on counsel, and if that defendant is a foreign defendant they get a translation at the same time, and that's been consistent with the template that has been arrived at in the other matters.

THE COURT: Okay. Thank you. Well, wait a minute, while you are there I do have a question. When would you anticipate that the consolidated complaints would be filed on counsel for everybody?

MR. PERSKY: Well, on wire harness --

THE COURT: In the wire harness.

MR. PERSKY: -- they have been filed.

THE COURT: With counsel. Okay. All right. Thank you.

MR. HANSEL: Your Honor, there is one other matter that is not in the agenda that we wanted to bring up today that we believe applies to all three groups of cases.

THE COURT: Okay.

MR. HANSEL: The directs, the auto dealers and the end payors, and it is with respect to the correct identity of one of the Fujikura defendants, and Mr. Persky will address that for all the groups.

MR. PERSKY: Okay. An entity called Fujikura America, Inc., a subsidiary of a Japanese company called Fujikura, Limited, is a defendant and has made a motion to dismiss. In the answering papers, in the reply defendant -- the counsel for I will call it FAI, Fujikura America, Inc., disputed the allegation that it was a subsidiary identified in the parent plea agreement as a subsidiary that sold the prix fixe product to the OEM, and that OEM's bid was fixed, and the parent pleaded guilty to that unlawful conduct.

So upon further research we determined that instead of FAI, Fujikura America, Inc., it was Fujikura Automotive America, LLC as a subsidiary. And in conversations with counsel for Fujikura, James Cooper of Arnold & Porter, who is

here, we have orally determined that, as I understand it, and he will correct me if I say it wrong, the motion will be withdrawn, we will amend our pleading to include allegations including Fujikura America -- Fujikura Automotive America, Inc., FAA, and those allegations will specifically include assertions in the plea agreement and the transcript. We will dismiss FAI, Fujikura America, Inc., without prejudice pursuant to an agreed upon tolling agreement which is being drafted now. After getting the amended pleading, counsel for Fujikura Automotive America and Fujikura, Limited, will decide if they want to make a motion against that replead complaint, but just speaking for myself, once we specifically state that it was Fujikura Automotive America, LLC that its parent admitted -- made the sales of the prix fixe wire harness products to a specific OEM we don't think there will be any basis for a motion but I'm not sure counsel will commit without having seen the complaint that it won't make a motion, but I believe this will resolve the dispute concerning Fujikura.

THE COURT: Okay. Mr. Cooper?

MR. COOPER: Thank you, Your Honor. James Cooper from Arnold & Porter on behalf of Fujikura.

I think that everything Mr. Persky said is more or less correct. My understanding is that we have agreed --

THE COURT: It is the less that I'm worried about.

MR. COOPER: Right, you and me both. We have agreed that so we have time today and tomorrow for motions to dismiss FAI out of the directs today and the indirects tomorrow. I believe that we have negotiated sort of a global resolution whereby those motions will be moot in essence because both the indirects and the directs will amend to take out FAI, they will put in FAA, along with presumably supporting allegations with respect to FAA, that's assuming, of course, that the group motions to dismiss, the direct and the indirects, don't result in the complaints being dismissed with prejudice. If that were to happen obviously then there would be no need to amend.

THE COURT: Right.

MR. COOPER: Thank you, Your Honor.

MR. PERSKY: Thank you.

THE COURT: Thank you very much. When we get to those motions just remind me of this agreement. Okay.

MR. HANSEL: So that was sort of a semi-housekeeping, semi-merits issue but we thought we would bring it up now.

Turning now to instrument panel clusters, if I may, Your Honor?

THE COURT: All right.

MR. HANSEL: The direct cases are fully served, and I would ask Mr. Raiter to address the auto dealer cases.

MR. RAITER: The auto dealers -- again, Shawn Raiter on behalf of the auto dealers.

The auto dealers have either accomplished service or we have an agreement to accept service in the fuel senders case.

THE COURT: Okay. End payors?

MR. PERSKY: The end payor cases have been fully served.

THE COURT: Mr. Persky, you said fully served?

MR. PERSKY: Yes. The end payor cases have been fully served.

THE COURT: Thank you.

MR. HANSEL: The deadline for the consolidated amended complaints is December 24th.

THE COURT: I wanted to talk to you about these deadlines, and this really goes to the fuel senders and the heater control panels also. I know the deadlines were set but it seems to me you are talking about filing it December 24th, I mean, really?

MR. HANSEL: Your Honor, I know that sounds nutty but here is why it is really okay with the plaintiffs. We actually have to get these things to the translator a couple of weeks ahead of time to translate them into Japanese and in some cases German pursuant to the template that has been established to serve foreign language documents on counsel

who -- for clients who have already been served with one complaint, so since we have already got these things well in hand ahead of time and at least for the directs we are not requesting an extension and it is not a problem for us because we are ahead of the game because of necessity because of the requirement to translate them.

THE COURT: Okay. And I'm jumping ahead as to the other two because, I mean, I really was thinking of spacing these a little bit more, even though you might be ready, both because of when things come in here and how the motions are going to be following I hesitate to have everything at one time.

MR. HANSEL: The direct purchasers, by the way, don't have a fuel senders case so that's not an issue for us.

THE COURT: That's not an issue, yeah.

MR. HANSEL: Of course, we will do whatever the Court wants.

THE COURT: If you are comfortable with it, fine. I was thinking of some deadlines like January 15th, the end of February, the middle of April for the third, you know, to scatter them, but if that causes a problem -- I'm throwing that out so I'm sure we will hear because we already have some up here.

MR. WILLIAMS: Good morning. Steve Williams for the end payor plaintiffs.

The Court's suggestion is fine with us if you want to have a -- stagger those by a 30-day period given the briefing, we have all done this, I think that does make sense for probably the Court and the parties to have that, so we could stick with that first December 24th date and then have a date roughly 30 days out for the heating control panels and the instrument cluster cases.

THE COURT: Okay.

MR. WILLIAMS: The attendant briefing schedules would then be the same.

THE COURT: All right. What if we stick to the December 24th date, and then for the fuel senders go to February 28th, and the heater control April 15th. Now, do those dates cause any trouble for anybody?

MR. HANSEL: It is fine with us, Your Honor.

MR. WILLIAMS: That's fine with the end payors.

MS. FISCHER: That's fine with us. On behalf of Yazaki, Michelle Fischer.

MR. RAITER: Fine for the auto dealers.

MR. WILLIAMS: The response dates for the complaints will just be pushed out?

THE COURT: Yes, everything will follow from the dates of the filing, so whatever scheduling orders you have or that it would go from these dates.

MR. WILLIAMS: Great. Thank you.

THE COURT: Thank you. Please, I don't want to be the grinch who stole Christmas, so you tell the people that you are working with that --

MR. HANSEL: Thank you. The interpreters thank you also I'm sure.

On fuel senders the directs have no case at present so it is auto dealers.

MR. RAITER: Shawn Raiter on behalf of the auto dealers again.

Your Honor, on fuel senders, I may have misspoken before, I was referring to instrument panels, but on fuel senders we also have either accomplished service or have an agreement to accept service as well.

THE COURT: On fuel senders?

MR. RAITER: Correct, both fuel senders and instrument panel clusters.

THE COURT: And instrument panels.

MR. RAITER: Thank you.

MR. PERSKY: That is the same for the end payors.

THE COURT: Okay.

MR. HANSEL: On heater control panels, the direct cases are against Denso International America, Inc. and Denso Corporation, and they have both agreed to accept service.

THE COURT: Auto dealers?

MR. RAITER: Shawn Raiter, again, on behalf of the

auto dealers, and we have the same status.

MR. PERSKY: The same with respect to the end payors.

THE COURT: Okay. So that's Denso and Denso what, the defendants on that one?

MR. RAITER: International America.

THE COURT: Denso International America.

MR. FINK: With respect to bearings, Steve Kanner will speak for the directs.

MR. KANNER: Good morning, Your Honor.

THE COURT: Good morning.

MR. KANNER: Let's start I suppose next on the agenda is item 5, and that's bearings.

THE COURT: Yes.

MR. KANNER: With respect to the status of service for the direct cases all the defendants have accepted service.

THE COURT: Very good. Auto dealers?

MR. RAITER: Thank you, Your Honor. For the auto dealers, we have either accomplished service or have agreements from all but two of the defendants at this point. We have asked the remaining two, which are NSK, Limited and Nachi-Fujiokoshi to accept service consistent with the agreements with the directs, so those are the two that we have not yet accomplished service or received an agreement to

accept service.

THE COURT: Okay. End payor?

MR. PERSKY: That is the same with respect to end payors, defendant Natshi Fugishaski and NSK, Limited, have agreed to accept service. We haven't yet gotten the acceptance of service back yet.

THE COURT: Very good.

MR. KANNER: Your Honor, with respect to case management orders, the following is going to apply both to bearings and to occupant safety systems as far as the case management order goes and the attenuate documents, the discovery plan, the expert stipulation, protective order and ESI stipulation. So with respect to the CMO and the attenuate documents, there is a difference of opinion between plaintiffs' counsel and defense's counsel with respect to not just the CMO but the timing and filing and substance, of course, of the related documents, the discovery plan, the expert stip and what have you.

I think part of that is caused by the fact that there has been a lot of preparation for other issues on the schedule today and CMOs have -- drafts of the CMOs have gone back and forth and we are all studying them now. In fact, this morning I spoke with counsel for defendants to try and coordinate what we believe would be an expedited schedule for getting a CMO to you and what that CMO would include. As I

said, there are some differences of opinion but we are going to attempt to work those out and have a CMO to this Court by January 15th. If we are unable to do so, and not just the CMO but the related documents.

THE COURT: Uh-huh.

MR. KANNER: If we are unable to do so, Your Honor, and there is a chance that that is going to happen, we have agreed, if it pleases the Court, to submit opposing documents with respect to the CMO and the related documents to the Court no later than January 15th, and we are open to a telephonic hearing or whatever the Court might prefer to do rather than have everyone come in town just on that limited issue of the CMOs and the timing and what have you. If that pleases the Court we will try to save a lot of time by arguing that this morning.

THE COURT: All right. I have no problem with telephone conferences to resolve -- I mean, as long as there is a reasonable number of you, I don't have any problem with that at all so that's fine.

MR. KANNER: All right. With that in mind --

THE COURT: January 15th. Are you saying you have until January 15th to work it out or by that date you are going to submit it to me?

MR. KANNER: By that date if we do not have it worked out we will submit our position papers to the Court.

THE COURT: Okay.

MR. KANNER: I believe that applies to the auto dealers and the end payors have agreed with that, and defense counsel, before I go on, if that's --

MR. FENNEY: For the record, Jim Fenney, Your Honor, in OSS. Mr. Kanner has accurately stated the agreement.

THE COURT: Okay. Let me indicate you will send the papers here and then I will have Bernie contact you to set up the telephone conference if necessary. Okay.

MR. KANNER: That would be great. Thank you, Your Honor.

THE COURT: All right.

MR. KANNER: With respect to occupant safety systems, which I believe is the last item on our agenda today?

THE COURT: Right.

MR. KANNER: On status of service of the direct cases, all the Autoliv defendants and TRW have accepted service. I note that TRW Deutschland, which is one of -- which is the holding company, has as a corporate policy requires service through the Hague, and for direct plaintiffs has been put into effect some 30 or 40 days ago, so that remains outstanding.

THE COURT: Okay.

MR. KANNER: Mr. Fink reminds me that on the bearings discussion, we have -- we have agreement by defense counsel for on the OSS but --

THE COURT: Wait a minute. On bearings?

MR. KANNER: Yes. Your Honor, it is my fault. I jumped ahead and I asked if defense counsel agreed with how I stated the position with respect to the CMOs, and I neglected to invite Mr. Iwrey to lend his consensus to that, so I do apologize. No slight intended.

MR. IWREY: Thank you, Your Honor. For the bearings defendant, we agree that Mr. Kanner has accurately stated what we agreed upon.

THE COURT: Okay. Let me ask you while we have gone back to the bearings, you want me to give you a suggested date right now for the telephone conference, would that help anybody?

MR. KANNER: Certainly.

THE COURT: Let me get the calendar. How about Thursday, January 24th at 2:00? Everyone who is involved can check that out. Is that a problem?

MR. WILLIAMS: That's good for end payors.

MR. IWREY: Could we do it later in the day? I may be returning from California, so is it possible to do it later?

THE COURT: You know, you go on a lot of trips.

MR. IWREY: Not voluntarily.

THE COURT: Why don't I move it forward to the 28th, would that be better, that's the Monday?

MR. KANNER: That works for me.

MR. WILLIAMS: Fine for the end payors.

THE COURT: We will set it for 2:00 for January 28th. Who will initiate the call then, the conference call?

MR. KANNER: I have no problem initiating it. We will certainly contact your clerk, or whoever you designate, or Mr. Fink will tell us the best way to accomplish that and we will do so.

THE COURT: All right. Let's go back to occupant safety.

MR. KANNER: I apologize for the detour. As I said, TRW Deutschland Holding is being served through Hague Convention, and otherwise I believe with the direct cases we have, as I said, everyone has been served.

MR. RAITER: On behalf of the auto dealers on OSS, we have either accomplished service or have agreements by the defendants to accept service with the exception of TRW Deutschland and Tokata Corp., both of which we are underway with the Hague process.

MR. PERSKY: For the end payors, we have accomplished service except that Defendant Tokai Rika Co.,

Limited, TRW Deutschland Holding, GmbH and Tokata Corp., we have commenced service under the Hague for all three of those defendants.

THE COURT: I have a question just because I'm curious: That GmbH, is that a form of corporate structure? Yeah? All right.

MR. KANNER: And I think that concludes the pretrial issues or the status with the exception of a date for the next status conference.

THE COURT: Okay. All right. Let me ask you while I have the calendar open here, what is your -- you are saying some convenient time in March. Is that sufficient time? Anybody have any other questions?

MS. FISCHER: Your Honor --

THE COURT: Your appearance first.

MR. FEENEY: I have no comments, Your Honor.

MS. FISCHER: Michelle Fischer from Jones Day on behalf of the wire harness defendants. We are also involved in instrument panel clusters and fuel senders.

When the parties talked about the next status conference it was linked to the timing of the CACs, so from my perspective I'm not sure that there is a need to have another status conference in March. It would simply raise for the Court that question about when it would make sense to have the next one given the changes in the due dates for the

CACs.

THE COURT: Our last due date was April 15th.

MS. FISCHER: 15th.

MR. HANSEL: Greg Hansel for the direct purchasers, Your Honor.

In our discussions about when the next status conference should be, the plaintiffs requested February, defendants suggested April, and we agreed on March as a compromise. I don't believe that was necessarily tied to the deadlines for the CACs since the process for handling those CACs is already established by CMOs that are already in place with respect to briefing on motions to dismiss. We just think it is important to have the status conference really for its own sake to keep the case on track as a whole.

THE COURT: And do you anticipate in terms of what will be covered in the status conference to be similar, service, miscellaneous issues?

MR. HANSEL: Yes, Your Honor, miscellaneous issues and, you know, there may be additional cases filed between now and then. There have been developments in the related global criminal investigations with respect to a number of products, there have been additional guilty pleas made in the U.S. criminal cases and --

THE COURT: Additional products?

MR. HANSEL: Yes, Your Honor.

THE COURT: Really?

MR. FINK: Congratulations.

THE COURT: What would they be?

MR. HANSEL: Well, there's a class of products called automotive anti-vibration rubber products, and about a week and-a-half ago there was a guilty plea by a Japanese national in the United States with respect to those products, which the Justice Department stated in its press release are part of their overall automotive parts antitrust investigation, so it appears to be, you know, headed your way, Your Honor. Those products are used to dampen vibration and noise in cars from the shaking of the engines and other parts in a car. In Japan there were fines and the Japanese equivalent of indictments with respect to four new products including automotive generators, radiators and fans and two other products, I can't remember right now.

THE COURT: Are they the same defendants?

MR. HANSEL: No. I think there are some overlap.

MR. KANNER: Your Honor, Steve Kanner.

The list of products which I suspect as my colleague indicated, will find their way to your courtroom include automotive generators, automotive starters, automotive windshield wiper systems, automotive radiators and electrical fans. There is some commonality of defendants but among the entities which are involved are Mitsubishi

Electric, Mitsuba, T.Rad, Calsonic Kansei, Hitachi Automotive Systems, Hitachi and Denso. So there are some familiar names that will come up but --

THE COURT: We don't have that much more room in our jury box.

MR. SANKBEIL: Can I comment? I am involved for Autoliv and NTN, for example. I think it is very inefficient. If there are new cases those new cases will follow their separate tracks just like all the other cases. To have every defendant appear for a status conference because the case in which that defendant is not involved with has been filed does not make a lot of sense to me.

THE COURT: Could you put your appearance on the record?

MR. SANKBEIL: I'm sorry. William Sankbeil from Kerr Russell.

MR. KANNER: Your Honor, we are certainly aware of that and Mr. Sankbeil or his colleagues made that reference very early in the history of these cases. I think what the Court has found, there are two points I would like to address, number one, the periodic status hearings which the Court has conducted every couple of months have a distinct way of defining what the issues are. If there are issues that come to light, they get resolved before the hearing or Your Honor resolves them. So that in and of itself with a

case of this magnitude to me makes imminent sense.

Secondly, certainly those counsel who have nothing up that day have a choice and certainly don't need to send, you know, staffing of three or four deep to those types of hearings, but I believe, as Your Honor as set it forth thus far, when we have a status conference we get everything done, and I think from our standpoint efficiencies are served by taking that process.

THE COURT: I will tell you what, what we will do is -- what did I say, February 28th? Let's go mid March, and that would really leave just the heater control panels that would not have been served -- or the complaint filed.

MR. KANNER: I think that makes sense.

THE COURT: So we are okay. Is the best day -- I know we did this today because of motions, but is a best day for you who are traveling here a Friday, a Monday, you know, any -- you don't care, you just come whenever? Okay.

MR. KANNER: I think it may actually be easier for those of us who are flying here to fly midweek rather than a Monday or a Friday.

THE COURT: Well, that's a very good comment. How about Wednesday -- let's see if I can find a Wednesday that's free -- March 20th?

MR. WILLIAMS: Your Honor, I apologize to be the only one, but I do have a conflict that date. Is there

another March date we can do?

THE COURT: Okay. Let's take a look. March 19th or is that still --

MR. WILLIAMS: Same conflict.

THE COURT: Same problem. Okay. Let's look at the next week. How's March 27th?

MS. FISCHER: That's a problem for us, Your Honor. That last week in March is a problem for many defendants.

THE COURT: Okay.

MR. KANNER: Is the 13th available? My calendar is clear.

THE COURT: March 13th is available. How is that?

MR. WILLIAMS: That's fine, Your Honor.

MS. FISCHER: Fine.

MR. KANNER: I think we have a good number.

THE COURT: Good.

MR. KANNER: Thank you very much, Your Honor.

THE CASE MANAGER: Do you have a time, Judge?

THE COURT: 10:00. All right. Let's see. I did want to speak with you about the page limits on your briefs because I noted that you couldn't meet the page limits so you have exhibits that are quite extensive that really should be in the brief. I like in reading a brief having the case cited in the brief, not footnotes, not charts. I like the charts, I like that, but I also like the citing in the brief,

so let's talk about page limits -- realistic page limits so we can get all of this in the brief and not in attachments. Anybody want to comment?

MR. WILLIAMS: Your Honor, Steve Williams for the end payors.

This actually anticipated one of the disagreements on the CMOs. We propose just have a page limit for the briefs and not have additional authorities and argument in those attachments. It appears that the 30 or 35, whatever it was, wasn't sufficient. I would propose then a 40-page limit, and I think this is really an issue with the indirect briefs, not the direct briefs, because of the state law issues, but I do think it is more helpful to the parties and the Court to have all of the arguments and authorities in the brief, not in eight or ten additional exhibits because then we respond and then there is a reply response. My proposal would be a 40-page limit for those briefs and no further authorities and arguments in exhibits or attachments.

THE COURT: I know my law clerk is saying amen. Go ahead.

MS. FISCHER: Your Honor, Michelle Fischer.

We would propose particularly on the indirects that because of the number of states involved that if we are going to no longer have appendixes that we just increase it to 50 pages and stick with it in the 50-page limit. It is awfully

difficult to provide authority, especially if you don't want it in footnotes, for up to 32 states as the case was in the indirect cases.

THE COURT: I know. Those states are -- that was a hard -- yeah. Okay. Let me raise the limit then to 40, except with the states I'm going to give you 50. All right. So if you are dealing with the states you can have 50 for your briefs. Those without the states 40.

MS. FISCHER: Thank you.

MR. WILLIAMS: Thank you.

THE COURT: All right. Is there anything else? Oh, wait a minute, what about the replies, the page limits?

MR. WILLIAMS: If --

THE COURT: Not 40 or 50.

MR. WILLIAMS: If I recall, were replies 25?

MS. FISCHER: 15.

MR. WILLIAMS: 15, so I would propose 20, I think that should be sufficient.

MS. FISCHER: So of course I have to propose 25.

THE COURT: All right. I will give it to you, 20 and 25, that's fine. So we are distinguishing it just for those classes that have -- the class that has the state claims.

MR. WILLIAMS: It would seem to me it really is just an issue of the omnibus brief for the indirect cases.

THE COURT: All right. Thank you. Is there anything else?

MR. HANSEL: Nothing from the directs, Your Honor.

THE COURT: All right. Indirects, anything?

MR. WILLIAMS: Nothing for the end payors, Your Honor.

MR. RAITER: Nothing for the auto dealers, Your Honor.

THE COURT: All right. Very interesting. Thank you all for coming in, I appreciate it.

We are going to go to motions. I don't know how you are going to divide up and who wants to stay but why don't we take a ten-minute break and then we will start with the motions.

THE CASE MANAGER: All rise. Court in recess.

(Court recessed at 10:08 a.m.)

– – –

(Court reconvened at 10:20 a.m.; Court and Counsel present.)

THE CASE MANAGER: All rise. United States District Court is now in session. You may be seated.

THE COURT: All right. I see you're sitting at counsel table in some particular order. My order may be different than your order, so let me ask you what you have in mind.

Give your appearance continually so the record --

MR. COOPER: Thank you. Good morning, Your Honor. James Cooper from Arnold & Porter on behalf of Fujikura and this morning on behalf of the defense group with respect to the direct purchase omnibus motion to dismiss, which we were thinking we would take up first --

MR. FINK: That's our case, Your Honor.

THE COURT: All right. That's fine. I was looking at the personal jurisdiction because it was smaller but let's go right ahead with what you have. That's fine. All right. So this will be the collective motion that you are dealing with for the direct.

MR. COOPER: That's correct, direct joint purchaser motion to dismiss.

THE COURT: You may proceed.

MR. COOPER: Thank you. First, as a matter of housekeeping, during the break I handed up to the clerk I think it is three slides with a cover page and I distributed those to counsel as well. I would like to refer to those during my argument?

THE COURT: All right.

MR. COOPER: I'm going to address what I will call generally the Twombly issues raised in the brief and my colleague, Mr. Gangnes, will address the fraudulent concealment and injunctive relief. We would like to -- I

know Your Honor has set a time limit, and we would like to reserve seven minutes of our time for rebuttal unless we end up with more time in which case we'll take all of it, if we can.

I want to focus this morning on really two major points for the Court. The first is the four guilty pleas that are referred to and discussed in the complaint and which are in our view the only substantive allegations that the plaintiffs have in the complaint. And what I'm going to talk about with respect to that this morning is how those guilty pleas and the related allegations cannot support the plausibility of an overarching 12-product, all-purchaser conspiracy that the plaintiffs allege -- these particular direct purchasing plaintiffs allege has impacted them.

And in that connection just in the status conference earlier this morning I think it was Mr. Kanner talked about with respect to other products a global conspiracy or something like that. Certainly the Court should understand that the defendants don't agree with that characterization of even this case let alone other product cases.

THE COURT: I understand that.

MR. COOPER: Thank you. The second major point I wanted to talk about was to focus on how the complaint does not establish which plaintiffs have bought which products

from which defendants. And as Judge Cox observed in the compressors case, which I'm sure Your Honor is familiar with, and many other courts have made the same observation, that pleading what you bought and from whom is an essential part of pleading standing in antitrust injury, so I'm going to talk about those two points.

As an initial matter I have included in our first slide some of the pleading standards from Twombly which I'm sure the Court is familiar.

THE COURT: I've heard of it.

MR. COOPER: Yes. Just two things on that: First, that the plaintiff must plead more than speculation or possibility that it is entitled to relief, in other words, it has to connect itself with the substantive allegations on more than just a speculative or possible basis.

THE COURT: What does plausible mean to you?

MR. COOPER: It means more than speculation, it means something on which if you look at the complaint and there are facts that are alleged, not just conclusions, that there would be an entitlement to relief if the evidence were to prove it up.

The other thing I should mention, Your Honor, is of course the prejudice that Twombly seeks to avoid or the guidance that it seeks to give, at least in our view, is the burden on the Court and the parties in engaging in discovery

in complex litigation for claims that don't meet that standard. In other words, Twombly suggests that close attention to the pleadings early on is important in avoiding the burden of complex litigation that would -- that proves to be unnecessary.

So with that in mind let me turn to the two substantive areas that I wanted to talk about this morning. First of all, the cartel conduct that the complaint alleges. The next page in our slide is a chart that summarizes the guilty pleas that are at least with respect to the first four that are referred to in the complaint. The first four are Furukawa, Denso, Fujikura and Yazaki. Those pleas were either announced or entered into by the time of the complaint, they are referred to in the complaint and attached to our motions. The last line is for Tokai Rika for which there has been a criminal information, this was post briefing, but no plea has actually been entered yet but from the information it is clear that it relates to heater control panels.

The points with respect to this chart are really three. First, the conduct in the pleas, and this is reflected in the complaint too, involve specific and different products. Now, in the complaint the plaintiffs have dumped them all into this category which they have defined as wire harness products and they do that early in

the complaint and then refer to just wire harness products without any specificity.

THE COURT: There is like 11 or 12 in that --

MR. COOPER: Well --

THE COURT: -- in that group?

MR. COOPER: -- that's sort of a philosophical question, Your Honor, because it's not -- there's at least 12, I think, and then it is not clear whether the plaintiffs mean that wire harnesses and wire harness assemblies are different things, in which case there's maybe 13, it is just not clear.

We've listed the parts that are identified in the pleas on the third column of the chart that you have there, and as you can see they are all different parts. So the point being that the pleas are directed at specific and different parts for each company.

THE COURT: The pleas don't say much though, I mean, they really don't.

MR. COOPER: I guess that's a matter of interpretation.

THE COURT: Okay.

MR. COOPER: They do talk about what parts are involved, and I guess that gets to my second point, which maybe you can say they say a little bit less, which is it is clear from the pleas, and certainly once you look at the

individuals who have pled that the conduct is directed at particular OEMs or automobile manufacturers, and you can see from the individual pleas that are listed in the second column there that the conduct is directed at Honda, Toyota and Subaru. There is an N.A. for Fujikura now because there was nothing in the record with respect to -- Fujikura's conduct was directed towards other than in the plea it says an automobile manufacturer. Now, last night the indirect purchasers filed the plea transcript for Fujikura and asked the Court to take judicial notice, and in the plea transcript it is clear that the conduct was directed towards Subaru, so you will see that when you have time to get to their motion.

The third point with respect to the pleas, the pleas and the complaint are both clear that the conduct that the plaintiffs are relying on is directed at this sort of specialized RFQ process, request for quotation process, that automobile manufacturers engage in when they are procuring parts, and it is sort of a sui generis thing where you start three years ahead of the actual production of the car, sending out RFQs, and the allegations are that there was cartel activity associated with particular RFQs and then with particular follow-on bidding or price negotiations that particular defendants and particular automotive manufacturers engaged in, so it is a specialized procurement process, it is not like --

THE COURT: Who does that process go on between? You've got the OEMs and the manufacturers. I mean, what goes on?

MR. COOPER: Well, the complaint doesn't say anything about that. I mean, I know a little something about it but there is nothing in the complaint -- there is nothing in the complaint about what product are we talking about, are these RFQs for electronic control units, for wire harnesses, for fuse boxes, for relay boxes. All of those could be different. The complaint doesn't tell us anything about that, which is part of the problem, we don't know what the -- what the details are of the substantive allegations that they are basing their conspiracy claims here on.

THE COURT: Okay.

MR. COOPER: So then the question arises, Your Honor, how do the plaintiffs tie -- they have these allegations that are based on the pleas, and how do they tie that to the impact on them? How do they relate their purchases to the substantive cartel allegations that they make? And in my review of the complaint, that's my next slide, I think there are two paragraphs where it can be fairly said where they seek to do this. They seek to make the connection that they have to make in order to meet plausibility between the subsequent conduct they are alleging and the impact that they say occurred to them.

The first is paragraph 98, which is the subject of some of the briefing, particularly the reply brief. Paragraph 98 says that suppliers to OEMs have been required to directly purchase wire harness products from defendants at prices established by the OEMs and defendants in the bidding process. In other words, a supplier is told by an OEM that it has to purchase a product at the price set by the OEM.

THE COURT: So at the outset the OEMs and the defendants have --

MR. COOPER: The allegation is that the OEMs and the defendants reach an agreement on a price and that somewhere in the world, not necessarily one of these plaintiffs because they don't plead that they are in this situation, what they plead is that somewhere in the world some direct purchaser is in this situation. That in and of itself isn't good enough to show that impact on them, they don't say anywhere in the complaints -- you know, none of these plaintiffs say I purchased from one of these defendants a product where I was told the price I had to pay as a result of --

THE COURT: Well, do the OEMs and the direct plaintiff purchasers, do they negotiate a price or is it just OEMs say this is what it is?

MR. COOPER: I don't know that, Your Honor, because there is no allegation in the complaint about how they get --

how these plaintiffs get to their price. I don't know the answer to that. That's a very good question. It is obviously relevant. I think the Court is right to want to know that, and it should be alleged in the complaint.

THE COURT: Well, it says in the complaint in your paragraph 98.

MR. COOPER: It says suppliers to OEMs, in other words, they don't say they are suppliers to OEMs.

THE COURT: Oh, I see what you are saying, the defendants don't say --

MR. COOPER: No, and the plaintiffs don't say that either. The plaintiffs don't say we supply the OEMs and we -- and in that relationship we have been told what prices we have to pay for a product, they don't allege that. Paragraph 98 just says it may be that in the world there are direct purchasers who face this situation.

The other thing I would say about paragraph 98, in addition to the fact that it is not connected at all to these particular plaintiffs, is, as Your Honor may have seen in our reply brief, we make a point that if the OEM is dictating your price by virtue of its negotiations then that's an indirect impact and you don't have standing as a direct purchaser, and we cited the Campos case there for Your Honor. So that would be a second -- even if they were to add the allegation that they were in that situation that would be a

second problem that they would face.

The other paragraph I think, Your Honor, that can be read is seeking to tie these particular plaintiffs to this -- to the allegations in the complaint taken from the guilty pleas is paragraph 112, which simply says, you know, defendants' pricing actions regarding their sales of wire harness products to automobile manufacturers had an impact on our prices. That's all they say. It is a bare conclusory allegation that simply pleads an element of the claim, all it does is plead the elements of the claim which case law is replete that that's insufficient. Just saying pricing actions, when you are talking about 12 or 13 or maybe more different products, and had an impact is not sufficient to put the defendants on notice as to what the basis is for the claim that the plaintiffs are making.

There are no allegations in the complaint, Your Honor, that discuss the pricing relationship between, for example, these RFQs that are the subject of the guilty pleas and the prices paid by these plaintiffs. In fact, there are no allegations that talk about -- other than wire harness products as a group of 13 different products, there are no allegations that talk about relationships between what it is that the OEMs buy using these RFQs and what it is that the plaintiffs actually buy, which product are they buying. There is -- we don't know the answer to that because it is

not in the complaint, and it is relevant to the defenses because if the products are different we will have defenses that we might not otherwise have.

There are no allegations -- well, certainly there are no allegations in the complaint that the plaintiffs themselves are auto manufacturers so there's nothing that says we are the direct target of this conduct and, indeed, as I have already discussed, there is nothing that says we are the suppliers to the auto manufacturers.

THE COURT: What if they aren't the direct target of the conduct but they have a direct effect? What if they are direct purchasers, they purchase directly from the defendants say?

MR. COOPER: So they haven't -- this is -- this raises another point. So maybe there would be a theory by which they would say they could allege there was price fixing directed at us, forget the OEMs, there was something directed at us, they haven't pled that, that's not their theory. All they pled -- what you see in 112 is their theory, which is pricing actions regarding sales of wire harness products to automobile manufacturers had an impact. In other words, the theory seems to be your negotiations with the auto manufacturers has an impact over here on us. Well, how? You are not auto manufacturers as far as we know so how --

THE COURT: Well, let's say, you know, they have

pricing which is inflated and if these direct plaintiffs want to purchase from defendants they have to pay the inflated price, right, isn't that the implication?

MR. COOPER: We could come up with complaints -- if we can assume facts and we can come up with complaints that would state a claim, I don't disagree with that, but we have to -- we have the cards we are dealt, we have the complaint we have in front of us, which doesn't meet that standard, it might be possible. I should be clear, I'm not saying either that there isn't a plaintiff who could make a claim on the basis of the guilty pleas or that there wouldn't be some way that relief could be granted to somebody who was impacted by the conduct in the guilty pleas, I'm not saying that. I'm saying these plaintiffs can't and don't state a claim in this complaint.

Your Honor, let me turn quickly to the product question. It is sort of a second major failure in the complaint. We have touched on it a little bit so I don't want to spend a huge amount of our time on it, but in order to establish standing in antitrust injury the plaintiffs have to allege what it is that they bought so that we can understand whether -- so we can understand a whole number of things, but whether they have standing is one. Some, if they didn't buy products made by a particular defendant, that defendant is going to have defenses it is entitled to raise.

So to use an example, my client Fujikura does not make electronic control units, ECUs. Denso make ECUs but doesn't make wire harnesses. Denso pled to ECUs, we did not, Fujikura did not plead to ECUs because we don't even make them. Did the plaintiffs, did they just buy an ECU? If they did, if that's all they bought, I would like to know that. And I think Denso would like to know if they didn't -- if they didn't buy an ECU. We are entitled to know what it is that they bought and from whom.

THE COURT: I think the question though, what's plausible? Is it plausible that because these different defendants have allegedly through -- well, through their pleas have conspired on various auto parts, is it plausible that the whole industry as to auto parts is involved?

MR. COOPER: Well, no, Your Honor.

THE COURT: Can you take that big leap?

MR. COOPER: That's sort of where I started. First of all, let me be clear, the pleas -- the pleas are with respect to, as I said, particular products and particular manufacturers.

THE COURT: Right.

MR. COOPER: In other words, the pleas suggest that, you know, supplier A and supplier B may have agreed on how they were going to bid this particular RFQ. Okay. That -- so that's its own particular conduct, it may not

involve anybody else. So it is not plausible from that -- first of all, it is not plausible from that to say one of these direct purchasers, and we don't even know what they bought, has stated a claim, but it certainly wouldn't be plausible from that to say well, there is this great overarching conspiracy involving all auto parts. There is no -- I don't think Your Honor will see an allegation, and it was already clear in the status conference this morning, these are all different companies and these are all different procurements and different points in time, different products, not fungible, not interchangeable so, no, I don't think it would be plausible.

THE COURT: Okay.

MR. COOPER: Okay. Thank you, Your Honor. We will reserve the rest of my time and let Mr. Gangnes --

THE COURT: All right. Mr. Gangnes? Is it G-A-G-N-E-R?

MR. GANGNES: It is Gangnes, G-A-N-G-N-E-S.

THE COURT: Oh, say that again slower.

MR. GANGNES: G-A-N-G-N-E-S, Gangnes.

THE COURT: Thank you.

MR. GANGNES: From Lane Powell, Your Honor. Good morning.

THE COURT: Good morning.

MR. GANGNES: Representing Furukawa and America

Furukawa, and speaking today on behalf of all defendants for dismissal of plaintiffs' fraudulent concealment allegations and injunctive claim.

In the brief few moments I have I would like to focus on the first two elements plaintiffs must plead to allege fraudulent concealment. They must allege, first, affirmative acts of concealment by defendants and, second, that those acts deceived plaintiffs and prevented them from discovering their claim.

The linchpin of plaintiffs' opposition is the argument that simply because they allege that defendants rig bids to automobile manufacturers they have alleged the requisite affirmative acts of concealment with respect to their claim. Because the plaintiffs have not adequately alleged any other acts of concealment, their allegations survive only if the ruling of some courts that bid rigging is an affirmative act of concealment apply in this case, and they don't.

Those rulings apply for the simple reason that plaintiffs have not themselves alleged a bid-rigging claim. They do allege a bid-rigging claim for certain auto manufacturers but none of the plaintiffs is an automobile manufacturer and none of them allege that they received any bids, rigged or otherwise, from defendants.

As Mr. Cooper pointed out, it is hard from this

complaint to understand exactly what sort of conspiracy the plaintiffs are alleging, but they seem to be alleging some sort of overarching conspiracy by defendants to fix the prices of all wire harness products they sold to all customers, and that claim is separate and distinct from the alleged bid-rigging conspiracy involving the automobile manufacturers.

The cases that the plaintiffs cite confirm that they have not alleged a bid-rigging claim themselves or an affirmative act of concealment. The first case they cite is the Pinney Dock case of the Sixth Circuit but that case had nothing to do with bid rigging. It had -- it involved collusive rate making by railroads. In the dicta that the plaintiffs quote from the Pinney Dock case, the court was simply describing the allegations in an actual bid-rigging case, the Ingram case. And if you look at the Ingram case, in that case the defendants allegedly rigged bids on public construction projects in order to drive the plaintiff, a competing bidder, out of the business. The Ingram court found that the rigged bids were affirmative acts of concealment because they deceived competing bidders and the public as to whether the bids that the defendants were submitting were actually competitive. In other words, the rigged bids prevented the plaintiff and the public from discovering their claims.

The rulings in the other two cases plaintiffs cite are based on the same rationale. In those cases defendants allegedly rigged bids on school milk contracts, and those courts also emphasized that the school districts had exercised due diligence by using a sealed bidding system in an effort to uncover any collusion and then reviewing the bids in detail before selecting the winner. In all three of those cases, and in every case we found where bid rigging was held to be an affirmative act of concealment, the plaintiffs in those cases had either received the rigged bids or were competing bidders.

Here the plaintiffs do not allege that they received bids, submitted competing bids, were even aware of defendants' bids to the automobile manufacturers or, in fact, did any due diligence.

THE COURT: Well, isn't that the point, they weren't aware of the agreement or the rig bidding between the defendants or the agreements between the automobile manufacturers and the defendants? How would they know, what reason would they have to suspect?

MR. GANGNES: Well, that's the whole point.

THE COURT: Right.

MR. GANGNES: The mere fact they didn't know is not enough. What they have to show is that the defendants engaged in affirmative acts of concealment that deceived them

and prevented them from discovering their claim.

THE COURT: Well, they do allege some secret meetings and things like that.

MR. GANGNES: Well, the case law is clear that --

THE COURT: Code names.

MR. GANGNES: -- using code names to meet secretly or meeting secretly in remote locations is not enough because from the beginning the law has been that mere silence or refusal or failure to divulge the wrongful conduct does not constitute fraudulent concealment.

There have to be affirmative acts of concealment, and those affirmative acts must have been directed to the plaintiffs, deceived the plaintiffs and prevented them from discovering their claim.

So in this case if an automobile manufacturer had learned that the defendants were rigging bids, that automobile manufacturer would have discovered its claim but these plaintiffs would not, and because they haven't adequately alleged an affirmative act of concealment their fraudulent concealment allegations must be dismissed.

THE COURT: Okay. Thank you.

MR. GANGNES: The injunction issues are addressed in the briefs, and if the Court has no further questions I would like to reserve some time for rebuttal.

THE COURT: Okay. Thank you.

MR. GANGNES: Thank you, Your Honor.

THE COURT: Plaintiffs?

MR. FINK: Your Honor, with respect to the response, Joe Kohn will speak to the arguments that were addressed by Mr. Cooper, and Gene Spector will respond to Mr. Gangnes' argument.

THE COURT: All right. Mr. Kohn?

MR. KOHN: Thank you, Your Honor. May it please the Court, Joseph Kohn with Kohn, Swift & Graf in Philadelphia for the direct purchaser plaintiffs.

Your Honor, first and foremost, I'm here to answer any questions that the Court may have. Obviously I did want to take the 15 or 20 minutes or so of our time that I have to really just discuss with the Court, first, what Twombly requires.

THE COURT: First discuss who you -- not who you are, but who your clients are. Are they the suppliers to the OEMs, the direct suppliers?

MR. KOHN: The clients, Your Honor, include those entities. They are anyone who purchases directly from the defendants named in the case. They include suppliers, which some of the named -- which the named plaintiffs are, they were generally smaller companies that bought the products directly from the defendants, would assemble them, put into a dashboard or into the doors of a car, and then those were

sold to the OEMs. The class also includes, and this claim is brought on behalf of a class which includes the OEMs, not just the large auto manufacturers but truck manufacturers, recreational vehicle manufacturers. There is a group of purchasers that buy these products direct. We think the class is several hundred separate entities.

Now, defendants have gotten --

THE COURT: Well, they are talking about direct plaintiffs not being direct plaintiffs.

MR. KOHN: And we disagree with that --

THE COURT: No, and their argument has some weight so --

MR. KOHN: -- to the direct purchasers that would be invoiced directly from these defendants and our clients pay for it.

Now, our clients enter in the marketplace and they turn around and do different things with their products. An OEM, like a Ford or a Honda, at times will buy the products directly from the defendants and at times will buy them from other members of the class, so that they have direct claims and they have other kind of claims. We are asserting the direct purchase claims for all of those entities.

And what I heard from the defendants, Your Honor, particularly Mr. Cooper, and Twombly speaks to does the defendant have sufficient notice to formulate a defense and

answer the complaint, which is the basic standard under Rule 8. And what I heard were defenses to the complaint. They weren't scratching their head saying what is this case about. They were zeroing in on the kinds of defenses they will assert at a class certification stage to say, oh, some of these products might be priced differently or the various products that make up the wire harness system, some of them they don't make and et cetera. Those are the kinds of argument we hear all the time at class cert. as to our ultimate damage amounts and damage claims, those are not pleading impediments under Twombly or under Rule 8 and Rule 12.

THE COURT: Well, they are claiming that you don't even allege what you purchased from these defendants.

MR. KOHN: That's simply not the case, Your Honor. The complaint is very clear, it alleges beginning paragraphs 76 through 91 each of the various 12 products that are mentioned in the complaint as wire harness and related products are identified individually. The complaint goes on to speak directly to this issue that the paragraph 99, that the success of the cartel required manipulation to the OEMs and then that price became the price in the marketplace, and we allege that specifically. Now, they can defend that claim. They can say as a matter of proof when you look at every one of these invoices and when you do your economic

analysis that does not hold but that doesn't mean that the complaint hasn't stated that claim.

THE COURT: But which plaintiff purchased what product, that's not defined?

MR. KOHN: All of the plaintiffs purchased wire harness and related products, some or all of those products. Now, we are not asserting -- we heard a lot of talk about the overarching conspiracy, that is, I would submit, a straw man or a red herring. If we were alleging that every auto product and we were in here in re auto product litigation, and if we had a complaint that said we have one complaint and it includes the heater control panels and the occupant safety, et cetera, okay, that might be some theoretical overarching conspiracy. This complaint was narrowly drawn with respect to the definition that the industry gives to these products, wire harness and related products, to the way the Government in the U.S. case and in the foreign cases define --

THE COURT: Does that include the electronic control units?

MR. KOHN: Yes, it does, and they are defined in our complaint, they are listed in the complaint as one of the --

THE COURT: I know you listed it as a related product but --

MR. KOHN: Yes, as a related product, and it is a related product. That's the way the Government, which investigated this industry, defined the products that were subject to those indictments. And the guilty pleas are admissions with respect to, and they all talk about the same language, there is an investigation into wire harness and related products. This complaint was drawn and filed after those proceedings, no one relied simply on an investigation or a rumor as you see in some cases and then fortuitously a guilty plea may occur later. After those actions were taken, after party defendants admitted to the conduct, then these allegations were drawn in the civil case, and I would submit that gets us well beyond the Twombly standard, which is --

THE COURT: But how do you get from what these defendants pled guilty to on these individual parts to this -- all of these defendants --

MR. KOHN: Yeah.

THE COURT: -- most of whom have not plead guilty to anything?

MR. KOHN: First of all, the Twombly standard, of course, is that we simply have to nudge our claim across the line. And in Twombly the Court was clear that the plaintiffs alleged a bare -- just simply a parallel conduct and no other facts. They had the bare assertion of an agreement, and the Supreme Court Justice Souter's opinion at page 566 is that

there were no facts alleged. They looked at market and they said these baby Bells are not competing with each other, ipse dixit there is an agreement or we can take discovery to see if there is an agreement.

We have submitted four separate categories of factual averments in this complaint that nudge us across the line, and some have a subset, some overlap. The first piece of evidence and factual pleading are admissions of the party -- of four party defendants in the forum of the guilty pleas. Now, the defendants like to refer to four pleas, they say that at page 8 of their brief and we just heard it in the argument, and that there are dozens of defendants. Your Honor, there are only seven groups of corporate defendants so that now of those seven, four have pled guilty, a majority.

Second, there are not simply four guilty pleas, there are 11 guilty pleas just as to the wire harness and related products, not getting into some of the others that were on the chart that was just shown, and I would like to discuss in a little more detail even as a separate category the individual guilty pleas, but there are seven flesh and blood human beings who have also pled guilty to being involved in these antitrust agreements. One of them, Mr. Funo, worked for Furukawa, and his guilty plea recites that not only did he work for the Japanese company, he worked for the U.S. subsidiary. Now, the U.S. subsidiary yet hasn't

pled guilty but we would submit that is an additional fact that while working for the U.S. defendant, which has not yet pled guilty, this individual has pled guilty to his conduct during that time period.

A Mr. Hanna Morro (phonetic), same story, worked for Yazaki for the U.S. sub and the Japanese company. The U.S. sub hasn't pled guilty yet. So there is more than just four isolated, if you will, in the language of the case law, the attempt to dismember these allegations or to compartmentalize them has been uniformly rejected, and Judge Borman wrote about that, among other things, in the Packaged Ice case.

So these pleas are alleged in detail in our complaints, they are allegations in the complaint, paragraphs 122 to 137, we set forth the facts these defendants have admitted to. The guilty pleas themselves refer to meetings, they refer to communications between competitors, they refer to agreements, plural, being reached between and among the competitors. Now, does that mean we win the case? Does that end the whole case? No. We have class issues, we have the precise amounts of the damage, we have the effects that these agreements may have on the market. No conspiracy is ever perfect.

THE COURT: Do you allege any individual conspiracies versus groups of defendants conspiring with each

other?

MR. KOHN: No. We allege, Your Honor, from these facts that it is plausible that there was one conspiracy to fix --

THE COURT: The overarching conspiracy?

MR. KOHN: With respect to wire harness and related products. You know, defendants point to the fact that, well, so and so pled guilty with respect to sales made to Toyota, and another individual defendant who is the salesperson for Honda plead guilty, and those should be dismembered and looked at separately. Was it just a coincidence that at the very same time and over the same lengthy period of time the Honda people were getting together and fixing bids, sales to Honda, and the executives from these companies who then sold to Toyota were just doing -- just totally coincidental? No, we say that is a fact that we can piece together brick by brick with other facts to show this industry behaved this way, and those agreements, and the guilty pleas talk about agreements plural, were sufficient conduct to -- again, it may not win the case with the jury yet, we haven't had discovery, but it is plausible, it makes the allegations of the complaint plausible and all of the case law supports that.

This is a far cry from a Twombly or the Travel Agents case in the Sixth Circuit that defendants principally

rely. Your Honor, if in Travel Agents four of the airlines had pled guilty to some agreement to effect the travel agents' commissions and seven executives were in federal prison I don't think the Travel Agents case would have been dismissed on a pleading. And we had one of those small-type footnotes that Your Honor has reminded us about that discussed some of the quirks about Travel Agents, that there has been a prior case with summary judgment, et cetera. If in Twombly the, you know, four of the seven baby Bells had pled guilty to an agreement to stay out of each other's territories, I don't think we would have -- we wouldn't have the Twombly case. That case would have proceeded and you wouldn't have a decision on pleading. This case presents a far stronger record in the complaint, much more detailed factual basis than many of the cases that have been sustained in which Twombly motions have been denied.

The aftermarket filters case didn't have admissions by the defendants like this, it had one disgruntled employee. We had argued the Packaged Ice case before Judge Borman. It warms my heart now to see the defendants think that was a really strong case at the time; some of these very same law firms said it wasn't. There was, again, one disgruntled employee who filed an employment discrimination or wrongful termination case which he alleged a hearsay conversation with one of the company executives who admitted to the illegal

agreement. That individual ultimately had his deposition taken, the other party of the conversation, and denied it.

We don't have one disgruntled employee here, we have seven people who worked for the defendants who have already admitted that they were talking to their competitors, that they were having meetings, plural, communications, reaching agreements. They have sworn under oath that that occurred.

And, you know, I have been working in antitrust cases for longer than I like to admit, and I think I speak for my colleagues as well, there is something that is still a little jarring to us that people go to prison for this conduct and, you know, it is pretty serious stuff and these folks -- you know, Mr. Nagata was the general manager of sales at Furukawa U.S.A. and the chief financial officer. So what do I have at the time of filing my complaint, I have an admission by the chief financial officer of one of the party defendants that he, in fact, entered into illegal antitrust agreements in this industry with respect to these products.

Again, it doesn't give us the whole case but these guilty pleas are used in many antitrust cases at the summary judgment stage. They are evidence that's submitted to show that defendant is not entitled to summary judgment. There is evidence of some agreement, the precise contours of it --

THE COURT: But is there evidence with these

defendants that there's more than they are just members of an industry?

MR. KOHN: Yes, Your Honor. There are admissions now by four of the corporate defendants, seven individuals, that they participated in an agreement to affect this market. Again, the precise contours have not been fully determined by discovery but there is certainly enough to say that it is plausible that this relatively limited number of corporations, the seven different groups that all make these products participated in this conspiracy. Other evidence that we have, of course, is -- or other categories of evidence which the courts have looked to in addition to these admissions are guilty pleas, so you can look to the scope of the investigation. Now, an investigation alone the courts have said is not going to get you over the line of plausibility, but when you look at it in conjunction with where that investigation has been going it is another separate factor.

Now, for example, paragraph 116 of our complaint alleges an FBI raid which included one of the entities that has not pled guilty. In order to have an FBI raid there is a prior approval by a judicial officer of some kind of a warrant to show that there is at least some evidence -- some reason to believe they were involved in the conduct. I don't know what the precise standard is for the criminal warrant

but I know it is more than plausibility, it is more than mere plausibility.

Paragraph 125 of our complaint refers to a statement by the assistant attorney general for antitrust. It says, quote, this cartel harmed an important industry in our nation -- in our nation's economy, close quote. That is another fact we have alleged with respect to the scope of the investigation, not it harmed one manufacturer, not it harmed a particular auto manufacturer, it harmed the industry.

Another broad category --

THE COURT: Wait a minute. I'm thinking of this search warrant that you are talking about.

MR. KOHN: Yes.

THE COURT: So you are saying there was a search warrant, they went in and that that fact -- now, I know you say not standing alone but you do raise -- you raise an interesting thing, somebody thought there was some connection or they wouldn't be there, some judicial officer signed it, that had to have been alleged in the search warrant itself --

MR. KOHN: Correct.

THE COURT: -- some connection to all of this?

MR. KOHN: Correct, Your Honor. And that is a fact, and I would submit there is case law where that fact together with the economic allegations that we have about the concentration in this market would be enough to get us over

the line, but we don't need to be making that kind of close call here when we have this, you know, long record and, again, you can't dissect them and dismember them. Defendants use the term that the guilty pleas were all discreet. You know, I looked up discreet; consisting of distinct and unconnected elements. I don't think these are discreet. They are part of one coordinated global investigation, A. They are all in a defined time period beginning in January 2000, ending in 2010, some were for a shorter period of time but all within that time period.

The complaint is not one -- this is not a situation where there was, let's say, a guilty plea for the year 2005 and the private plaintiffs come in with a complaint for 2007 to 2010, our complaint is right within this same time period. They are all for the harnesses and related products. Again, we are not trying to borrow from the heater control indictment or the instrument panel indictment and say see, they are doing some bad things out there, so that gives us some plausibility with respect to wire harnesses. No, every one of these was with respect to wire harness and related products.

And I would note all of the guilty pleas require ongoing cooperation by the pleading defendant in the ongoing unitary investigation of wire harnesses, so they are not discreet or separate or atomized events.

THE COURT: Okay.

MR. KOHN: I want to touch very briefly on a whole other category of allegations, and these are really two separate subgroups with respect to the economic allegations, and there are a number of cases, we cited the Ice case among them, Standard Ironwork case, Carbon Black, that look to allegations of concentration in the industries and barriers to entry that is conducive to collusive conduct, and those are additional facts that push you over the line of plausibility with respect to Twombly.

Also in paragraphs 104 and 105 we allege that the input costs were flat or stable yet prices were going up, which is economic behavior and economic fact consistent with collusive behavior. Those are additional facts that push us over the line.

And in a number of cases, the Flash Memory, SRAM, TFT, look to those types of allegation even in cases without guilty pleas where there may just be some smoke about an investigation.

And additionally -- finally, Your Honor, there is a fourth group we do allege opportunities to conspire, not only in paragraph 106, which refers to trade association meetings, but the detailed allegations about the guilty pleas because the guilty pleas all mention meetings and communications with co-conspirators. Those are opportunities to conspire.

Now, the Government may draw from that a plea as to one agreement that has four corners but when conspirators are getting together and doing something that they now admit is against the law such that they will go to prison, it is perfectly plausible to assume that they may have discussed other agreements and/or broader agreements or other customers other than the ones that they can parse out and limited.

The guilty pleas, Your Honor, are not some sort of safe harbor, that if a defendant -- if what they plead to and if they can stay within the four corners of the plea they are exonerated from anything else that might be related to it or outside of it. It is just the opposite at this stage of pleading, it gives us plausibility as to the antitrust agreement.

Now, how the damage models will ultimately play out, whether certain classes or even you get into situations where you have subclasses that have different degrees of impact or different degrees of damage, but that is an issue after discovery of certainly alleged antitrust injury, specifically in separate numbered paragraphs 153 and 154, paragraph 99 we set forth the allegation with respect to the effect that the bid rigging to the OEMs has on the prices paid to, quote, all other direct purchasers of wire harness products.

THE COURT: Okay.

MR. KOHN: So it is not a mystery, we have alleged it.

THE COURT: What about the other half of the defendants who aren't connected to the guilty pleas or the raids, are they in simply because of market share? Does a chart showing their market share make them --

MR. KOHN: They are in, Your Honor, because of the plausibility of the agreements with respect to this industry, yes. As I said, some of them had their individual employees plead for periods of time when they worked for a subsidiary. Others, T-ram was subject to the FBI raid, so you can look to specifics, but through the economic facts and the allegations of agreement, the allegation of meetings and, again, the case law is full of decisions that you do not have any requirements at the pleading stage to get into a defendant by defendant listing of that behavior. And I would -- well, there are a number cases that state that and a number I have mentioned.

THE COURT: Okay.

MR. KOHN: Your Honor, on this issue of the bid rigging to the large purchasers affecting the overall market, we have discussed in some detail the Optical Disk Drive case in our brief, I think at pages 18 and 19. That is a perfectly analogous situation where there was bid rigging to the large computer manufacturers, Dell and HP, and the court

discusses in detail and says that's absolutely an allegation that can show those bids will then affect the price paid by the smaller purchasers in the market.

And perhaps one other small hypothetical on that situation, if there was conspiracy in the City of Detroit between the soft drink -- local soft drink bottlers, between Coke, Pepsi and the local bottled water company, and they want to rig the bids they are going to charge to raise the prices that they can charge to every restaurant and bar in the Detroit area. And one of the ways they go about doing this is they rig the bids to the Westin and to the Double Tree, where most of us are all housed for the last couple days, and they can determine, okay, you get the Westin, we will get the water business at the Double Tree, you get the Cokes at the other hotel, and then that price becomes the price that they charge to the Gateway Deli and to the other folk across the street and to the smaller restaurants and bars. That's all the theory is. That's what was in Optical Disk Drive, that's what's happening here or what we have alleged to happen here. Obviously we will be put to our ultimate proofs.

THE COURT: Let me ask one question because your time is up. How did you decide to leave certain defendants out of this lawsuit, was it their market share?

MR. KOHN: Your Honor, with respect to the amended

complaints?

THE COURT: Yes.

MR. KOHN: No, it was not with respect to market share, it was with respect to further discussions and investigation that we did with respect to the entities that we believe were focused in these agreements and in this conduct.

As class counsel we have obligations to protect the class's rights with respect to the statute of limitations for possible defense, we believe we have done that appropriately and properly, and as part of the process and exchange of information that is already underway.

THE COURT: I was just curious.

MR. KOHN: Certain defendants are already producing their documents, there's a lot of talk about what the discovery will lead to. We are already into the discovery with respect to a number of them.

Your Honor, if I can take another minute, I think I have already rambled on too long on some of these points, but just a minute on this secondary argument that's the indirect purchaser issue. Again, we believe we discussed that in our brief but defendants point to a case, Campos vs. Ticketmaster case.

THE COURT: Okay.

MR. KOHN: And there was some language in that case

where the court said that the agreement between Ticketmaster and the stadiums or the venues, that's the agreement where Ticketmaster imposed a service charge, then you are buying the ticket so you are an indirect purchaser of that service charge. They said that's a, quote, antecedent transaction.

I think what the defendants did here was simply seize on that terminology, antecedent transaction, and said the bids to the OEMs are some kind of antecedent transaction so if you then buy in the market, a la the Optical Disk Drive case or my example about the hotels and the sodas, that it is an antecedent transaction and therefore you are an indirect purchaser.

Now, not every separate transaction makes you an indirect purchaser. I mean, here we have purchased a product directly from the named defendants. The other counsel who represent the dealers and the end payors then buy it indirectly in the chain of commerce. The Campos case spoke about examples of how a baker who buys price-fixed dough and then sells bread. We are buying the dough, we are not buying the bread, the indirects are buying the bread, so I think that issue is not again at this point an issue.

So, Your Honor, respectfully I think we have more than met the Twombly standard of plausibility. I think this case is well within the mainstream of those cases which have denied such motions and sustained the complaints. There are

only a handful of cases where there are guilty pleas that have had any kind of narrowing of the case. I don't know one that has done what the defendants have said, which is the entire case should be dismissed, and I guess there's the old saying of where there is smoke there is fire. Now, I don't need to prove today that there is fire, I just need to say where there is smoke coming out of seven stories of a 20-story building, and seven people have run out of the building covered in soot, and I'm the fire chief, I would like to go in there and see if there is a fire, is it at least plausible that there might be a fire in there. I think the defendants' position is, no, Fire Chief, it is okay, everything is under control here, you can all go home.

So with that I would respectfully request that the motion as to Twombly be denied in its entirety, and my colleague, Mr. Spector --

THE COURT: How do you conceal a fire is what the question is? Okay. Let's hear that.

MR. KOHN: Until the smoke comes out the fire may have been smoldering for some time.

MR. SPECTOR: Thanks for giving me something to play with. Now I have to figure out how we hide a fire.

THE COURT: Yeah.

MR. SPECTOR: Eugene Spector on behalf of the direct purchaser plaintiffs, Your Honor. I will address the

issue of fraudulent concealment and injunctive relief, and I will be very brief.

The issue is whether we have pled fraudulent concealment so that our fraudulent concealment claim is plausible. We have to satisfy the Twombly standard. Does it mean we have to satisfy you now that fraudulent concealment has, in fact, taken place? That's something to prove at a later date. And it is fundamentally a factual issue and one that really should not be decided at this stage. It can be, of course, it has been in other cases, but it really is something that is a factual issue.

Here what have we alleged with regard to fraudulent concealment? Have we alleged that there has been affirmative acts of concealment? We certainly have, Your Honor. We have alleged rigged bids, we have alleged efforts to keep that secret, we have alleged monitoring and concealing the conspiracy, we have alleged that the pricing has been unilateral, we have alleged everything was hidden. Actually nobody really could have known anything until the Government action took place, and once the Government action took place and we were aware we acted promptly, we acted within the statute of limitations and we have brought actions -- and our clients have brought actions that are appropriate.

THE COURT: Would there be any reason to know that these prices were rigged -- or fixed, excuse me, before the

Government action?

MR. SPECTOR: No.

THE COURT: Any reason?

MR. SPECTOR: None, and the defendants can't point to any because there aren't any. There is nothing that would have put plaintiffs on inquiry notice of this price-fixing conspiracy prior to the Government action.

THE COURT: Well, defendants I think kind of talk in their pleadings about, you know, did you do your due diligence.

MR. SPECTOR: The question is when does the due diligence duty arise, and I think it is pretty clear from the cases of Carrier, Polyurethane Foam by Judge Zouhary in the Northern District of Ohio, the Packaged Ice case here by Judge Borman, that that duty to arise -- that duty of due diligence doesn't arise until you have some reason to believe that there is something to pursue, something to follow.

THE COURT: Well, did the prices go up -- maybe this is factual as you are saying, but did prices simply go up when maybe input costs or material costs did not, I mean, could there be something like that?

MR. SPECTOR: Even if prices did go up and input costs did not, that would not in and of itself be enough to tell you that there is a price-fixing conspiracy; you need more than that, and so I don't believe that that would put

anyone on inquiry notice.

THE COURT: What would it tell you?

MR. SPECTOR: It would tell us that prices went up because they could.

THE COURT: Okay.

MR. SPECTOR: These are the suppliers, Your Honor. I mean, if the suppliers -- if suppliers -- it is kind of like Twombly in that sense, if you've got parallel pricing as the Supreme Court said, that parallel conduct in and of itself is not enough, it doesn't give rise to a claim and I'm not sure that it would even give rise to an inquiry notice.

THE COURT: All right.

MR. SPECTOR: There is a quote from I think it is Judge Zouhary in Polyurethane Foam quoting from a case that says -- the Pinney case, requires reasonable diligence, not constant cynicism. And I think that that really is the kind of standard that you need to look at -- look to in determining whether due diligence is called for, whether there is something that would trigger the need to do that investigation. Just as in Packaged Ice I think this is a question that the Court should leave for the jury and not decide at this stage.

With regard to the injunctive -- unless Your Honor has another question for me with regard to fraudulent concealment, with regard to the injunctive relief claim

Mr. Gangnes really said nothing except they will rely on their briefs, and as will we, but I only raise one question, and that is, we don't have a separate count for injunctive relief, it is just one of the forms of relief we ask for at the end of the day, and if we don't prove it at the end of the day we won't get it, and so it seems to me that just like fraudulent concealment this is something that should wait until the end of the day and not be decided now.

THE COURT: All right.

MR. SPECTOR: Thank you, Your Honor.

THE COURT: Okay. Thank you. Reply?

MR. COOPER: Thank you, Your Honor. I will confess that I haven't tracked my time but I will try to be quick.

THE COURT: I will give you --

MR. FINK: In that case, Your Honor, they are out of time.

THE COURT: We will give him a few minutes.

MR. COOPER: No good deed.

THE COURT: Go ahead.

MR. COOPER: Your Honor, you asked Mr. Kohn exactly the right question, which is a simple question which he didn't answer, and that is who are your clients and what did they buy. And he talked about the class and what direct purchasers out in the world who might be members of the class might have bought or under what conditions, but we don't have

a class; maybe one day but not now. We have these particular direct purchaser plaintiffs and they have to have standing, so he needs to know what they bought. And he I think then retreated to, well, they bought wire harness products, 1 or, I don't know, more of the 13 or 12 or 14 products that are in that basket. The complaint needs to answer that question in the allegations.

With respect to -- Mr. Kohn spent a lot of time talking about the pleas. First of all, there is no dispute that the conduct pleaded to -- it was serious conduct and there are serious repercussions, and we are not disputing that.

THE COURT: You dispute the numbers like there are four defendants who pled guilty but really there were also the individuals?

MR. COOPER: Well, I didn't -- I didn't audit the numbers, Your Honor, as I was sitting back there. I don't have reason to dispute it other than let me make this point, you know, they sued, for example, Tokai Rika, and I think you will hear from them separately, and since now we have an announcement, it looks like, of a plea and it is for heater control panels, so it's completely separate. Each of these products are separate. There is no -- the Department of Justice in the pleas doesn't set out to define a market, it's just writing language about the products, and the products

are different in every plea. So when Mr. Kohn is saying, oh, that's -- wire harness products is a market, you know, that the Government -- a term that the Government uses and that the defendants use, I don't think that's right. For example, look at the Denso plea where wire harnesses aren't even involved and yet Denso is a defendant.

Mr. Kohn said well, you know, a plea is not a safe harbor, and I don't disagree with that, and obviously there are a lot of cases where pleas are part -- are part of the allegations that support a complaint, including Packaged Ice, which I will come to in a second, but pleas are also not a free pass that, oh, if a defendant has pled to something they can be sued by any participant in any market where the defendant might participate. That's not true either. There has to be a linkage, as I said in my main argument, between the pleas and the conduct that's alleged in the complaint.

THE COURT: What's your primary case where a defendant has pled guilty and the antitrust complaint has been dismissed?

MR. COOPER: Well, elevators.

THE COURT: Elevators.

MR. COOPER: That's one. Even if you look at Iowa Ready Mix, that's another one, if you look -- let's take Packaged Ice. If you look at that, there isn't -- it is not just that somebody entered a plea, and the court recounts, in

fact, there is this phrase if there, then here, that's in a lot of the cases.

THE COURT: Uh-huh.

MR. COOPER: And in every -- well, at least I'm not aware of a case where the court talks about if there, then here and doesn't -- where it finds the complaint is supported doesn't find that there is -- that there are allegations that link the pleas to the particular conduct affecting the plaintiffs.

Even in Packaged Ice we had -- as Mr. Kohn said, we had confidential witnesses who gave detailed statements with respect to a national conspiracy. You had the same type of purchasers in Packaged Ice so that the plaintiffs -- the pleas were in a certain geographic market, the plaintiffs say well, we are the same kind of purchaser just in a geographic market. Here -- well, first of all, obviously we don't even know what these guys purchased, but they are clearly not automobile manufacturers, and that's a distinction right off the bat. Also in Packaged Ice the corporate actors were the same in the region and nationally so that -- that's not been alleged here. There were separate internal investigations into national conspiracies in Packaged Ice, we don't have that.

So in every one of the if there, then here cases there is something more than just the pleas that support the

complaint. The other -- if Your Honor had more questions?

THE COURT: No.

MR. COOPER: The other thing I wanted to touch on briefly were the market structure arguments which get very short shrift in the complaint, and Mr. Kohn mentioned them and I just want to touch on them very briefly.

THE COURT: Okay.

MR. COOPER: The complaint does allege there is a high concentration in the market but doesn't explain, as I think Your Honor was observing, why it is that some major companies with major market shares were not defendants. Usually the point of alleging high concentration is to say we have all the cartel members who have most of the sales in the market and that makes it easier for them to succeed. When you have a cartel member -- or when you have a producer who has a high market share and is not part of the cartel, then actually that is evidence going the other way, that doesn't support market structure as a basis for plausibility. And, indeed, in the chart there are some non-defendants who have big market shares and there are some defendants who are not even listed in the chart, so that's not explained in the complaint.

In their brief, but not in the complaint, they make the argument market structure wise that all defendants can produce all products. It is not alleged in the complaint, I

believe, because it is not true and it can't be --

THE COURT: Wait a minute. They didn't say in the complaint that --

MR. COOPER: No, no, in their brief, so in the event that I just want to be clear that there is no allegation with respect to defendants' ability to substitute products on the supply side.

THE COURT: All right.

MR. COOPER: Then the only other structural point I think they make is they just allege high barriers to entry.

THE COURT: Correct.

MR. COOPER: It is not clear from that allegation how that would relate to the market structure, and, in fact, we don't know what these -- we don't know in the complaint what these plaintiffs do. It may be that they make wire harnesses in which case the argument --

THE COURT: What is that high barrier to entry was like the cost of the machinery to produce these things or what? What was --

MR. COOPER: It was sort of the boilerplate that it -- yes, that a lot of investment is required to get into this business without any detailed support for that.

THE COURT: Okay.

MR. COOPER: One thing I want to draw Your Honor's attention to if you were even considering this market

structure allegations is the absence of --

THE COURT: Of course I will consider it.

MR. COOPER: Well, then let me suggest that you also consider this: The absence of an allegation with -- that these are commodity products and, indeed, the allegations in the complaint suggest they are not, that they are model specific, for example, that they involve individual circuits, et cetera, that they are custom -- that wire harnesses, and I'm not even talking about all the other products are custom, and that actually is again another factor that would point against the market structure as helping with plausibility.

THE COURT: All right.

MR. COOPER: So the absence of that allegation is important.

THE COURT: Thank you.

MR. COOPER: Thank you, Your Honor.

MR. KOHN: Your Honor, may I?

THE COURT: No, we are not done yet. Mr. Gangnes?

MR. GANGNES: Briefly, Your Honor. Mr. Spector said that a Twombly standard applies to the fraudulent concealment, and that's just not right. They have pled fraud so it is clear in all the case law that Rule 9(b) applies to their allegations, they must plead facts that meet each of the three parts of the Pinney Dock or Carrier Corporation

test with particularity to satisfy the pleading standards for fraudulent concealment, and they haven't done that.

He mentioned affirmative acts of rigged bids, and I explained in my opening remarks why plaintiffs are not asserting a bid-rigging claim themselves here so that doesn't work for them. He said that everything was hidden and that the defendants had made representations publicly that their pricing was unilateral and these very points were addressed by the Sixth Circuit last March in the Carrier case. In that case the complaint alleged that defendants utilized covert meetings and gave false and pretextual reasons for the pricing of copper tubing, and described such pricing falsely as being the result of competitive factors.

The Sixth Circuit held that those allegations were conclusory, not supported by any facts, and therefore lacked the requisite particularity as it failed to specify the time, place and content of the alleged fraudulent acts as required by Rule 9(b).

THE COURT: Okay.

MR. GANGNES: As far as everything being hidden, as I mentioned in responding to Your Honor earlier, the Sixth Circuit has been quite clear that mere silence or unwillingness to divulge wrongful activity is not sufficient. There must be some trick or connivance intended to exclude suspicion and prevent inquiry. In other words, the

affirmative act must be directed at the plaintiff, deceive the plaintiff and prevent the plaintiff from discovering their cause of action. In this case the rigged bids don't do that because the rigged bids were not directed to these plaintiffs, they were directed to automobile manufacturers.

The Sixth Circuit noted that actions such as would deceive a reasonably diligent statute will toll the statute, and in this case there simply aren't any affirmative acts of the defendants that were directed to these plaintiffs and deceived them so that they were unable to discover their claims.

THE COURT: So then is it your position that the plaintiffs should have been on notice before the guilty pleas and needed to do some due diligence?

MR. GANGNES: Well, that's a separate part of the three-part test. That's the due-diligence prong and Your Honor is quite correct that the duty is investigate does not arise until the plaintiffs are on notice that they might have a claim. In this case they admit that they were on notice that they might have a claim when the Government investigations were announced in February 2010. What the case law requires them to do is then allege what steps they took to investigate, and if you look at the plaintiffs' complaint here there is nothing about --

THE COURT: So we are looking on the period between

the Government getting started and the guilty pleas, that period there?

MR. GANGNES: That's correct, that's when the duty of due diligence arises. And, again, when you compare what happened in the Carrier case with what happened here, this complaint is deficient because it does not allege any steps that the plaintiffs took to investigate their claims.

THE COURT: Good. Thank you.

MR. GANGNES: Thank you.

THE COURT: All right.

MR. KOHN: Your Honor, if we could between us have about 60 seconds?

THE COURT: What is there, surrebuttal?

MR. KOHN: I appreciate it. Thank you, Your Honor. Your Honor, just as to the case law that was cited with respect to the question of whether guilty pleas have been -- the Elevator case had no U.S. -- didn't even have a U.S. investigation, no U.S. guilty pleas, the original complaint was based on some investigations in Europe, there were no U.S. guilty pleas.

The Ice case, Your Honor, was a guilty plea by one of the defendants to the Detroit metro market and southern Michigan. Judge Borman sustained a nationwide complaint. Later a second defendant pled guilty to a similarly narrow market, the Michigan market. The third defendant that was

kept in the case had not -- never pled to anything, never was prosecuted by the Government. Those guilty pleas said nothing about the rest of the country; Pennsylvania, Illinois, Kentucky, Florida, what have you.

Iowa Concrete, Your Honor, one case that the judge's decision latched onto, an allegation in the complaint about the specific properties of Ready Mix Concrete which convinced the Court that the statewide or regional guilty pleas could not apply, and what the judge said was this, quote, third, allegations of an overall conspiracy appear to be implausible in light of the nature of Ready Mix Concrete as alleged in the amended consolidated complaint, paragraphs 22, 23. As alleged, Ready Mix Concrete must be produced and delivered within a limited geographic area such that it is not clear how all the defendants could compete within the entire undefined Iowa region, close quote. So in that case, yes, there were guilty pleas but the court said the guilty pleas were localized, you couldn't expand it because of allegations in the complaint that the product -- it is mixing and the concrete hardens if you don't get it where it should be.

THE COURT: Okay.

MR. KOHN: With respect to the chart, Your Honor, just one point, that was a worldwide chart, the market share, so some are -- there is a dominant player in Europe and it

did not -- it was for background and it did not represent U.S. market share.

THE COURT: All right.

MR. SPECTOR: If I might, Your Honor, just one point?

THE COURT: I can count.

MR. SPECTOR: Mr. Gangnes referred to the Carrier opinion and how the conclusory allegations were insufficient. I would like to read to you from the conclusion of the court: We therefore conclude that taking the allegation in Carrier's favor as we must at this stage of the litigation, Carrier has adequately pleaded its fraudulent concealment claim, and its cause of action should not be dismissed as time barred.

Thank you, Your Honor.

THE COURT: Go ahead.

MR. COOPER: They opened the door, Your Honor. Very quickly. I just want from -- Mr. Kohn read a quote from Iowa Ready Mix, Judge Bennet's opinion there. I want to just read very quickly where he is talking about Packaged Ice compared to Ready Mix Concrete, and he says what is missing in this case, however, is the larger picture from which inferences of a wire conspiracy can be drawn from guilty pleas to separate bilateral conspiracies. That's the same situation we are in here, Your Honor. Thank you.

MR. GANGNES: I like this Carrier case, and I'm

glad Mr. Spector mentioned it again because the portion of the opinion he's referring to shows how that case differs from this case. In the Carrier case there were European Commission findings that the plaintiffs were able to import into their complaint in which the conspirators had established security rules and coding systems in order to hide documents and evidence, and the Carrier court held that that was affirmative conduct and it was sufficiently affirmative because the alleged actions involved taking active steps to hide evidence as opposed to simply meeting in secret. So meeting in secret is insufficient, there has to be affirmative acts, and in the Carrier case it was hiding evidence that allowed the court to permit the fraudulent concealment allegations to go forward. Thank you.

THE COURT: All right. Thank you. Okay. One second here. All right. Next, Fujikura is out of this, so TRAM.

MR. FINK: Your Honor, with respect to the motions involving -- both the motions involving TRAM and later there's motions involving Denso, these motions relate to both the motions -- the motions themselves are addressed to both the direct and indirects.

THE COURT: We are just going to do the direct.

MR. FINK: Okay. The indirects are prepared but --

MR. KLEIN: I will say that I don't expect that I

will have anything separate to say about the indirects --

THE COURT: Okay.

MR. KLEIN: -- tomorrow.

I don't -- for these purposes I don't think there are material difference that we need to worry about.

Your Honor, Sheldon Klein, Butzel Long, on behalf of Tokai Rika Co., Limited and TRAM, Inc. TRAM is the American subsidiary of the Tokai Rika Limited.

For the topics that I'm going to expect to talk about today I don't think there is a distinction so I will generally just refer to Tokai Rika encompassing both of them.

THE COURT: All right.

MR. KLEIN: Your Honor, I don't know if you noticed that late yesterday evening one of the plaintiff groups filed a request that the Court take judicial notice regarding, in part, recent developments regarding Tokai Rika, specifically the fact that a criminal information has been filed with respect to Tokai Rika and a Justice Department press release relating to that criminal information.

THE COURT: I did not see that.

MR. KLEIN: If I can approach the Court and give the Court a copy?

THE COURT: All right.

MR. KLEIN: I will note that there were three documents which you were asked to take judicial notice of,

only two of them related to TRAM or Tokai Rika, and those are the only ones that are attached there.

THE COURT: Okay.

MR. KLEIN: We have no objection to the Court taking judicial notice, but what the Court is going to notice when it does so is that the plea does not mention wire harnesses or wire harness components; the plea relates solely to heater control panels, the HCP market, as we sometimes abbreviate it. And so after a two-year investigation -- in that two-year investigation what comes out of that is a conspiracy in an entirely separate market.

Mr. Kohn went to lengths to explain how careful they were in defining this conspiracy and so, for example, he said, and I think this is an exact quote, we are not trying to borrow from heater control panels, you know, to show how careful they were. And I'm going to return to this in a bit but it is obviously central that they ask the Court to take judicial notice of a -- of a plea relating solely to heater control panels apparently believing that it has some application here, not withstanding Mr. Kohn's comments, and, you know, I think Mr. Kohn's comments were entirely proper because that's what the law says.

Turn to the complaint, they only make two substantive allegations regarding Tokai Rika, and it is probably being generous to call one of them substantive. The

first is that we participate in the market, that's paragraph 101 of the direct complaint. The second is that we were subject to a raid back in February of 2010. Now, with respect to the participation in the market, the main briefs and Mr. Cooper's argument addresses the relative unimportance of participation. Of course, you know, if you don't participate in the market you can't be an antitrust defendant but that obviously doesn't carry the ball very far.

There's just a few specific facts regarding Tokai Rika that I think are relevant. One is the market share chart that has been referred to a couple of times. Tokai Rika is absent. After doing their due diligence, and I will accept the plaintiffs did good due diligence here, apparently they could find nothing that mentioned Tokai Rika or identified Tokai Rika sales in the context of this market and, of course, it doesn't identify a single product -- as with everyone it doesn't identify a single product that Tokai Rika sells, so we are left with the raids.

Now, in general the facts that the raids are not sufficient for -- one, raids don't necessarily -- an investigation or a raid doesn't lead to an end result, as we have seen here, and also because there is actually nothing in the complaint that says the raid even involved -- the raid on us involved wire harnesses, but the more important fact is that we now have the plea agreement where the raid didn't

lead to any findings or any plea regarding or doesn't even mention the wire harness market.

You know, Mr. Kohn talked about where there is smoke there is fire. Well, this time there is no fire. You know, based on this filing, the agreement with the Government here, we know there was an investigation and there is no fire with respect to Tokai Rika. Needless to say, the heater control panels we will need to deal with at some point civilly but that is for another case.

Now, does the fact that we didn't plead to wire harness irrebuttably (sic) prove that we weren't part of a wire harness conspiracy? No, it doesn't, but we are talking about plausibility and the question of whether it is too speculative to leap from the fact of a raid and the fact of a non-plea to any sort of wire harness conspiracy.

THE COURT: Well, a number of defendants didn't plead to wire harness conspiracy.

MR. KLEIN: I'm sorry, I didn't hear you, Your Honor.

THE COURT: A number of the defendants didn't plead.

MR. KLEIN: Sure, that's absolutely true but what's changed now for Tokai Rika is that we have now - you know, the Government investigation has come to an end and it has resulted in a plea that doesn't involve wire harnesses. You

know, again, we now know there's -- that the investigation at least didn't lead to the fire that Mr. Kohn referred to.

Now, I expect defendants are going to try to rely on a series of cases, and Mr. Cooper mentioned at least the theory of the cases and discussed some of them. The if there, then here cases where courts have found that pleas with respect to a narrower or somewhat different conspiracy at the pleading stage are relevant to, not sufficient but relevant to, the adequacy of the pleading and those cases are entirely distinguishable, even if they are good law. And, of course, it is a thread that runs throughout the law that in general bad conduct is -- doesn't -- I mean, certainly at an evidentiary level but for other purposes bad conduct, you know, doesn't prove anything in other areas, it is not enough to say he's a bad person, he could have done anything, and so in general it is appropriate to view these cases from that general, narrow perspective, but if you look at the cases, and there is -- I believe it is referred to as the SRAM case, there is a Flash Memory case, I think I can give -- no, I guess I didn't include the cites in the notes I brought up here, but they are discussed in all the briefs and I can provide the cites later.

THE COURT: Yes.

MR. KLEIN: A case that I am going to discuss a little bit, Milliken & Company vs. CNA Holdings, 2011

West Law 3444013, also discussed in the cases, and each of them -- when you read the cases there are specific allegations directly connecting the conspiracy to which there was a plea to the conspiracy that's subject to the complaint, and each of the cases find that the fact of the plea in the other case is not sufficient alone to carry the ball on a Twombly analysis of whether from the fact that you participated in one conspiracy it is a reasonable inference, a plausible inference, that you participated in another different conspiracy.

In the Milliken case that I have mentioned the complaint, quote, identifies the specific ways that the defendants in the other involved entities implemented their conspiracy, close quote, quite separate from the different conspiracy that some of the defendants pled to. That's entirely lacking in this case.

And then the court is -- it discusses the pleas, it actually separates the allegations into two buckets. One are the facts related to the conspiracy, and then it goes on to say that the other conspiracy to which there was a plea and some other similar conduct is contextual, and given the specific allegations the contextual information was sufficient to nudge the case-specific allegations over the line. And it concludes by saying, quote, these allegations standing alone probably would not establish a plausible

suggestion of conspiracy, closed quote.

That's exactly what we have here. There -- as to Tokai Rika there is nothing in the complaint that connects the allegation -- connects Tokai Rika to the conspiracy other than the fact that they allege that we participate in some unknown way in the market and the fact that we were subject of a raid. They don't have a single other allegation, I mean, other than place of business, et cetera, that even mentions Tokai Rika, and under those circumstances they just haven't met their Twombly burden of making us part of any conspiracy that did exist here relating to one or any of the products that are the subject of this case.

THE COURT: Thank you.

MR. KLEIN: If I can just briefly, I hope I haven't exhausted my time, it is actually a slight change of subject but I do want to touch on something that was touched on before. There was a fair amount of discussion about the fact that their allegations say that the OEMs dictate the prices and require --

THE COURT: Right.

MR. KLEIN: -- these plaintiffs to buy at those prices.

There is a term of art in the industry that's called a directed supply relationship.

THE COURT: What?

MR. KLEIN: A directed supply. They would be a directed supplier. It is a commonly used -- I raise it in part because I think it would be very helpful shorthand as we go, there are directed supplier agreements. I have actually spoken numerous times at supplier trade association meetings and the type about directed supply agreements, so it is a very common relationship commercial practice in the industry. And the point of the directed supply relationship, and their allegations just flat out say, all of the economics of the deal, the price, are between the OEM and the supplier. Now, so, of course, it is the economics that matter for antitrust purpose. Now, if this was a breach of warranty claim might it matter that the fact that a purchase order, you know, as a matter of administrative convenience is, even though the economic deal is between the directed supplier and the OEM, that in the middle there is an intermediary? This is just a product liability claim and we were talking about whether privity was necessary or that sort of thing, all that matters, but given that antitrust law is focused on agreements that restrain trade and inflate prices, and the only agreement here is between -- that is alleged at least is between the OEM and us, not between us and them, we believe that the directed supply relationship is a fundamental flaw in their case if, indeed, they are directed suppliers and as an economic matter it means that they are not a direct

purchaser notwithstanding --

THE COURT: Wait a minute. Even if the OEMs set the price ultimately, and that's the agreement, the effect is to all people who purchase from them, right? All people who purchase have to pay this particular price?

MR. KLEIN: I think Mr. Kohn confused two separate issues. In the example that he used of an agreement to fix the price to a big hotel and it turns out to be the same price that gets paid by the small bar, the difference -- that's not our situation. The difference here is that the OEM is dictating the price. It is not that it has the consequence of raising the price to the small bar. It is that, in using his example, the hotel said -- the hotel is negotiating the price both for the small bar and for the hotel. So it is a fundamental -- it is not that they are affected -- simply affected by the agreement, this pricing agreement between the OEM and us, it is that that is their price; the OEM says get out of the way, you aren't -- we are going to work out the economic deal, when it is done we are going to say you are going to buy from the directed supplier and you are going to buy at this price, and they are almost irrelevant to the economics of the transaction. It is fundamentally different from the fact that a price negotiated by a big supplier may wind up being a broader market price paid by people who are otherwise strangers to the

relationship. I hope that makes sense.

THE COURT: I'm not seeing the distinction here. I'm lost.

MR. KLEIN: Okay. So --

THE COURT: Try again.

MR. KLEIN: I'm trying to come up with hopefully a clearer analogy. The OEM says to their clients, according to the allegations of that complaint, you have to buy this part, the specific part, from this defendant, and we are going to sit down with that defendant and tell you what price you are going to pay. In the hotel example, the big hotel doesn't go to the small bar and say we are going to insist --

THE COURT: Okay. I see what you're saying, they don't have any communication with the bar, it is just they end up paying that much.

MR. KLEIN: Sure, just as a matter of function of the market as opposed to -- I mean, the hotel doesn't dicker and dictate the price that the small bar pays, it may be that the small bar winds up paying that same price but it is fundamentally different from a directed supply relationship.

THE COURT: I see. Thank you.

MR. KLEIN: Thank you, Your Honor.

THE COURT: Mr. Kohn?

MR. KOHN: May it please the Court, Joseph Kohn for the direct purchaser plaintiffs.

Your Honor, I think with respect to the individual defendants' separate motions we obviously do rely upon the omnibus briefing and --

THE COURT: And you don't have to repeat, it is just if you have something specific.

MR. KOHN: I will limit myself to something new, and also the briefing, which was much more concise with respect to these we really rely upon and stand upon those.

So in addition to the overarching and the plausibility, et cetera, of the conspiracy, any number of cases have held that a guilty plea as to some defendants but not others does not mean the others who were not -- where there was not yet a guilty plea or never is a guilty plea are dismissed from the case. Such cases include the Fructose decision which actually was on summary judgment in the Seventh Circuit, the Flat Glass case. The Air Cargo case where there were in that case dozen -- really were dozens of separate corporate defendants, some had been indicted and pled, many hadn't, and the magistrate judge entered a long opinion dismissing those that had not been indicted or pled guilty, that was reversed by the district judge. The SRAM and Flash cases in California which counsel referred to. The Hinds case in New York, many banks and financial institutions, some had been named in a criminal proceeding, others hadn't, and the ones that hadn't were kept in the

criminal case. All of these cases were cited at page 12 and 13 of our principal brief and then as well as in the brief with respect to TRAM.

The FBI raid, I think counsel has conflated the concept of raid and investigation. He says there's courts that say an investigation doesn't get you anywhere but there are all kinds of investigation. This one moved from the level of we have opened a file where there is a press release to an FBI raid for all the reasons we previously stated within paragraph 116.

The criminal law standard is a much more stringent one than the civil law standard and, again, we are not even at the point of proving our claim under the civil law standard, we are just at the stage under Rule 8 and Rule 12 of alleging a civil law violation.

THE COURT: Let me ask you directly, did this plea to another part, not wire harness, heater control --- -

MR. KOHN: Yes.

THE COURT: Does that have any impact on the argument that you gave before?

MR. KOHN: I think it does. I think it helps the plaintiffs. If you look at the SRAM case and the Flash case, there the courts were saying the fact that you did plead to another product may very well establish that you were part of a conspiracy on the second product. Now, this just came in

the last day or two, we have not argued that, but if you look at those cases, yeah, there had to be some additional facts. For example, were the employees who worked in the sale of product A, did they overlap with the ones that sold product B? So it certainly doesn't give them a get-out-of-civil-court free card. If anything, it would be some additional factor --

THE COURT: They wouldn't get out, they would just move to another category.

MR. KOHN: Yeah, right. It seems to me it is another billow of smoke and it certainly does not exonerate them.

We also relied in our briefing on the allegation with respect to the direction and control of Tokai Rika, and I think those are all adequate allegations as well.

We would invite Your Honor's review of the Milliken case which counsel cited, again, one, which does not have the extensive admissions in the forms of the pleas, et cetera, here. And, again, any number of the cases; the Fastener case is yet another one, a recent decision in the Eastern District of Pennsylvania that there is no requirement for plaintiffs to go defendant by defendant and separately repeat allegations or separately define.

The Optical Disk case says, quote, detailed defendant-by-defendant allegations are not required. A

complaint must allege that each individual defendant joined the conspiracy and played some role in it because at the heart of the antitrust conspiracy is an agreement that a conscious decision by each defendant to join it. The complaint alleges that. We identified each of the group of defendants, we identified that they sell these products, we have allegations and they are summarized in our brief paragraph 115, paragraphs throughout that these defendants participated in the meetings and agreed, so we have made those allegations --

THE COURT: Okay. I don't want to go into it again.

MR. KOHN: -- that are necessary to join then.

All right. Thank you.

THE COURT: Thank you. Any reply?

MR. KLEIN: I'm going be very, very brief. Mr. Kohn said there's lots of cases that say a plea in a different market establishes -- is sufficient to establish the claim, and that's just not true. In none of the cases does a court rely on a plea in the other market as sufficient to state a claim. In every one of the cases, as I said, there are case-specific allegations connecting the defendant involved to the conspiracy to the extent that it considered the other pleas and, you know, it speaks in terms -- it is something to be considered to nudge it over the line but it

is not a replacement for factual allegations connecting us to the conspiracy. And, again, the only allegation here is the fact of a raid and that we participated in some unknown way in the market, and that's not enough. Thank you, Your Honor.

THE COURT: Thank you.

All right. We have, let's see, Leoni, Denso and Lear, right?

MR. FINK: Yes. With respect to Leoni, the direct -- in the direct case the Leoni defendants have been dismissed -- voluntarily dismissed.

MR. TUBACH: Your Honor, Michael Tubach for the Leoni defendants.

The Court's order scheduled a hearing for today and tomorrow stated the Court wanted to hear jurisdictional arguments today. We are -- counsel is right that we are out of the direct purchaser case, but the indirects have still made jurisdictional arguments with respect to one of my clients. Did the Court want to hear that jurisdiction today or tomorrow?

THE COURT: No, tomorrow.

MS. STORK: Anita Stork for S-Y.

THE COURT: I'm sorry. Your name?

MS. STORK: Anita Stork for S-Y Systems Technology Europe GmbH.

We are in a similar situation in that we still have

a jurisdiction motion but the direct purchasers have dismissed S-Y Europe without prejudice so our jurisdiction motion goes only to the indirect purchaser complaint.

THE COURT: Okay.

MS. STORK: And we are scheduled for today, but the Court may want too recess that if you are moving the interim purchaser argument to tomorrow for jurisdiction.

THE COURT: All right. Maybe we'll take that for tomorrow. Okay.

MR. FINK: Your Honor, finally, the same holds true for Kyungshin Lear's motion. They have also as I understand it been dismissed voluntarily.

THE COURT: Lear did?

MR. SANDERS: Yes, Your Honor. This is Parker Sander for Kyungshin Lear. We have been dismissed from the direct --

THE COURT: Okay.

MR. FINK: In the direct case.

THE COURT: Oh, dismissed from direct, yeah.

MR. SANDERS: In the direct case only.

MR. FINK: Without prejudice. You heard that, right?

MR. SANDERS: I did.

THE COURT: Okay. Denso, then, is that -- you're the electronic control person?

MR. CHERRY: Yes. Good morning, Your Honor, or almost good afternoon. I'm Steve Cherry and I'm with the law firm Wilmer, Cutler, Pickering, Hale & Dorr, and we represent Denso.

THE COURT: Okay.

MR. CHERRY: With respect to Denso, Denso does not make any of the products at issue here other than body ECUs, and there are no allegations in the complaint that contrary we don't believe they we can allege in good faith that we do make any products at issue here other than body EUCs, and that's all that our plea addresses is body ECUs. There's not any reference in our plea to wire harnesses or anything to do with wire harnesses, it's just body ECUs. We also pled guilty to the sale of body ECUs as to a single automobile manufacturer, so that was the conspiracy.

THE COURT: Is the ECU part of wire harness? I mean, I asked that in the very beginning.

MR. CHERRY: Frankly we never thought of it that way, Your Honor.

THE COURT: I thought there was some conflict.

MR. CHERRY: No, we make body ECUs, we don't make wire harnesses. We don't make any of these things. We sell body ECUs, we sell them primarily to one automobile manufacturer, and that's what we pled to and that is what we did. And nonetheless the plaintiffs have asserted this

overarching conspiracy claim against us involving sales of at least 11 products that we don't make, and for sales to people we have never sold to. To our knowledge they never bought a body ECU from anyone.

I have heard you ask them repeatedly what they bought and from whom, and they never answered the question. I would like to hear the answer because we know we didn't sell anything to them and I don't think anyone else did.

So they have this claim of this overarching conspiracy which is completely divorced from our plea and from the reality of our business. And they provide -- and their response to that because they don't want to tell us what they bought and they want to lump all of this stuff in together basically to hide the ball is they say it is all one market, they say it is the same market, but they don't allege any facts to support that. They don't allege facts showing any of these products are reasonably interchangeable, they don't allege any cross elasticity of demands, they don't allege facts showing any relationship in the pricing of a body ECU versus automotive wiring or a fuse box or anything else. They just baldly assert same market so we don't have to tell you, so there's no facts to support that assertion, not one, and the cases are very clear on this point and they are directly against them.

In regard to Elevator, the plaintiffs there

asserted a conspiracy to fix prices as to elevators and elevator maintenance services, and their claim was based on an overarching conspiracy -- a global conspiracy that involved the U.S., and it was based on facts coming out of the E.U. There was an E.U. investigation and there were findings of violations there, and they were saying those were supportive of their claim of a broader conspiracy beyond the findings of a violation, much like here where they have a narrow violation involving ECUs and they say this is, you know, it would support an overarching conspiracy. So they made the same argument, global market. The court there rejected that and dismissed the complaint because they failed to allege facts to support that bald assertion of that type of global market, and the court specifically said that they failed to allege facts of any sort of global marketing, of any fungibility among the products sold in Europe versus the products sold here.

There were no allegations of the actual pricing to show any relationship in the pricing. You can't just make it up, you just can't say it is all one market, you have to allege facts to show it. And, in fact, the court said, and I'm quoting, to survive our motion to dismiss an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes, an analysis of the interchangeability of the use

and the cross elasticity of demand, and it must be plausible.

Also, a second case, in regards to Iowa Ready Mix Concrete, there were three criminal guilty pleas all to the sale of the very same product and with overlapping time periods, but the plaintiffs tried to allege an overarching conspiracy of a broader region and a broader time period rather than the three discreet conspiracies. And the court dismissed saying they failed to allege facts to fill in to show any sort of overarching conspiracy beyond the terms of the plea agreements. And beyond that, the court said that they failed to allege facts showing that the defendants are, in fact, competitors in the same market. They said it, there was a bald assertion that they are competitors in some regional market but they didn't allege facts to show it. And the court said indeed the plaintiffs do not even allege that the geographical market in which any of the defendants operated or any overlap among their geographical markets such that a wide range of conspiracy can be inferred. Bald allegations that defendants are competitors certainly do not suffice to cross a line from possibility to plausibility, and dismissed their claim.

They rely on this point primarily on a case called in regard Chocolate, which really doesn't help them at all. And there the issue was there were findings of violation in Canada and the plaintiffs alleged a U.S./Canadian conspiracy,

so, again, an overarching conspiracy involving the U.S. based on conduct in what the defendant said was another market, Canada. The court denied the motion but based on the finding, and there is a detailed discussion of this by the court, that they -- that the plaintiffs had alleged abundant facts to support their allegation of a U.S./Canadian market. They had alleged facts showing that the markets were tightly interwoven, to use the court's terms, that they consisted of homogeneous interchangeable chocolate products. The complaint in turn included facts showing that a substantial amount of the chocolate sold in Canada was manufactured in the U.S. and imported to Canada, and that a substantial amount of the chocolate sold in the U.S. likewise came from Canada. And the complaint also alleged that the defendants had integrated their sales organization so they didn't have a U.S. sales organization and a Canadian sales organization, they had a North American sales organization that sold to both places and set the same prices to both places, and that was central, that was what the court based its holding on.

Those facts are totally lacking here. There is not one fact to support any assertion of the same market, none of those facts exist here.

They also rely on --

THE COURT: They do have the same investigation though, it seems like the Government went off in Japan and

Europe and U.S. and --

MR. CHERRY: I'm sorry?

THE COURT: They seem to allege some commonality because of the Government investigations that were going on across the continent.

MR. CHERRY: Your Honor, the Government is investigating auto parts and we were raided, we weren't raided because of anything to do with wire harnesses, that was not part of our investigation, it had nothing to do with us. The Government came in the door and they knew that we don't make wire harnesses. It had nothing to do with us. It was body ECUs and heater control panels, and that's what we pled to.

You know, there are other people maybe still here from the status conference that make totally different parts. You know, the investigation by the Government and these various raids we are hearing about involved different parts and different markets and different companies, and no one can infer from a raid that that somehow has anything to do with wire harnesses.

So the other case the plaintiffs rely on largely is SRAM, and in that case, as was just discussed with Tokai Rika's counsel, the defendants in SRAM some of them had also pled guilty as to DRAM, and the court held that the plea as to this other product was relevant. The court said it is not

sufficient standing alone to get you over the mark but will consider it because the same defendant had a large market share both in DRAM and in SRAM and because the same salespeople at the defendants had pled guilty to fixing prices on DRAM, those same salespeople were responsible for their sales of SRAM so the court said under those circumstances we will consider that, that's relevant. Not enough to get you over the bar but it is relevant.

Well, here, again, we don't make any of these other products so that case is completely inapposite to us. Our salespeople who sell body ECUs, they don't sell any of those other products. The case is completely different.

They also refer to Flash memory, that's almost identical to SRAM.

THE COURT: All right.

MR. CHERRY: They refer to Packaged Ice as been discussed there. Everybody made packaged ice, there was no dispute about that, the issue was just reagents. Some of the people had pled to a plea involving southeastern Michigan and the Detroit area, and the issue was whether you could consider that in the mix of the other factual allegations in the complaint in deciding whether they -- the plaintiffs had adequately alleged an overarching conspiracy involving the entire nation.

Well, there they had detailed factual allegations

based not only on a disgruntled employee, as Mr. Kohn said, but also on two confidential witnesses who worked for different defendants that described the details of a nationwide conspiracy including explicit allocations of customers and market outside of Michigan, outside of the boundaries of the plea. We have nothing like that here. There's no facts that describe any conduct by Denso outside of the boundaries of its plea. There's no allegations that we did anything with wire harnesses or any of these products because we didn't, and it is not in the complaint.

THE COURT: Okay.

MR. CHERRY: There is one other case that they may address, it actually isn't in the briefing on our motion but we notice that they have cited it in opposing some of the other individual motions, so I will go ahead and address it, if you don't mind.

It is in regard to Fasteners, and that's a case that was brought originally against four companies that made various types of fasteners like zippers and snaps and buttons and all thing that fasten apparel, are things that facially are somewhat interchangeable. And there was no dispute that the defendants made all the various type of fasteners. The E.U. had in that case investigated and imposed fines on each of the defendants for various type of fasteners, and made a public announcement that the four of them had conspired in

the markets, plural, for fasteners.

In addition to that, the complaint itself contained detailed factual allegations as to over 50 meetings among the four defendants in which they defined the companies that attended, some of the people at some of those companies, when and where they met, and the types of agreements they reached about various types of fasteners.

We would contend that case is completely distinguishable here. There are no such facts about us making any other type of product, every meeting with any defendants and discussing any other type of product. It is completely inapposite, and so I just wanted to address that in case it comes up.

THE COURT: Okay.

MR. CHERRY: Thank you.

THE COURT: Response?

MR. FINK: Mr. Kohn will be responding. I just wanted to take one moment to make sure I didn't mislead the Court when I made the reference to Kyungshin Lear being dismissed. Lear is still a party, and they are still -- that motion is still up next.

THE COURT: Are you talking about Lear's bankruptcy issue?

MR. FINK: Right, the bankruptcy issue is still before the Court. I just didn't want to trick the Court into

thinking this was almost over and then suddenly there was another motion to argue -- or disappoint the Court.

THE COURT: No. I see some of you looking, we may break for lunch after this and then we will do Lear bankruptcy motion.

MR. FINK: Keep in mind, counsel is allowed to nap during these proceedings.

THE COURT: Oh, okay, but I'm not.

MR. FINK: I didn't say that, Your Honor.

MR. KOHN: Your Honor, Joseph Kohn for the direct plaintiffs. I think the half life of these arguments are moving in the right direction, so I will try to keep it that way.

Wire harnesses and related products. It is in our complaint, that's the class we seek recovery for. Where did that come from?

THE COURT: Yeah, where did it come from?

MR. KOHN: Where did it come from?

THE COURT: How did we get ECUs?

MR. KOHN: Is it something that we made up? No. Let's start with the first guilty plea in these cases with respect to Furukawa, it was Exhibit A to the defendants' motion to dismiss. Page 3, it talks about the relevant time period. First of all, January 2000 to January 2010. Automotive wire harnesses are automotive electrical

distribution systems used to direct and control electronic components, wiring and circuit boards. The following are defined as, quote, related products, close quote, for purposes of this plea agreement, and it says automotive electrical wiring, lead wire assemblies, et cetera, et cetera, and you move down to electric -- electronic control units, fuse boxes, et cetera. This is something that defendant Furukawa agreed to. It is evidence. It is an admission.

The next one is Yazaki, same introductory language, January 2000 to February 2010. During the relevant period, it defines auto wire harnesses are automotive electronic distribution systems. The following are defined as, quote, related products for the purpose of this plea agreement, automotive electrical wiring, lead wire assemblies, down to electronic control units, fuse boxes, relay boxes and junction boxes. Yazaki agrees to this.

Next is the Denso plea. For purposes of this plea agreement the relevant time period is January 2000 to February 2010, same period. During the relevant period defendant's sale of ECUs that were affecting U.S. automotive manufacturers totaled 237 million. During the relevant period the defendant, through certain of its managers and employees including high-level personnel of the defendant, participated in a conspiracy with other persons and entities

engaged in the manufacture and sale of ECUs, the primary purpose of which was to rig bids and to fix, stabilize and maintain prices of certain ECUs.

It continues, during such meetings and conversations agreements were reached so that the number of related products here of 12, Your Honor, is a relatively small number of sub products --

THE COURT: Denso only talks about ECUs and the other two pleas talk about the whole kit and caboodle.

MR. KOHN: That include ECUs.

So what we have seen in a number of cases, and, again, these are usually arguments that develop in the summary judgment or the class certification stage. For example, the major Vitamins antitrust case, a lot of reported decisions. Not every defendant made every kind of vitamin that was the subject of the case, some did. There was a list of vitamins, that was a lot more than 12.

The Flat Glass case which my colleague, Mr. Spector, was involved in. We cite this as page 18 of our principal brief, and this, again, is usually in the summary judgment or class cert. stage, but it has this language which is classic. Quote, contentions of infinite diversity of product, marketing practices and pricing have been made in numerous cases and rejected. More importantly, any difference in the manner in which the conspiracy was

manifested throughout the marketing and distribution of the various products does not change the common question, namely whether defendants acted in concert to decrease competition among themselves, and that was again at the class certification stage where there has already been discovery and there are proofs.

They say the glass case there were dozens of different kinds of glasses, some are tinted, some are used in office building, some are residential. Not all defendants made all products but that doesn't mean that there wasn't an illegal agreement for all of them to do what they could to raise the price of those products that fit within that definition.

That's all we are saying here about harnesses, we are not reaching into the other products. I suppose the defendants would say in addition -- if there is going to be -- since there's already the six, seven, eight matters scheduled for status, I think what Denso is saying is, no, there should be a separate case for ECUs on its own track, separate despite these agreements. No, we think we have -- our contention is that it was one of the related products which these entities sell as a part of a unified system which they agreed to, that they conspired, and the fact that one vitamin maker might only sell the vitamin B line and gets involved with this conspiracy for B, you know, that's tough

luck, if you join a conspiracy you can be responsible for the broader effects of it.

THE COURT: Okay.

MR. KOHN: Thank you.

THE COURT: Thank you. Mr. Cherry?

MR. CHERRY: Your Honor, again, the cases we have cited are crystal clear. I mean --

THE COURT: What about the Vitamin case?

MR. CHERRY: First of all, it is pre-Twombly. Second of all, part of the conspiracy there alleged was an agreement -- an allocation of products that you will not make this particular type of vitamin; I will make this, you will make that. It was an allocation of products, not only of customers and reagents. That was all part of the alleged overarching conspiracy. There is no allegation of that here nor could there be. There's no fact to support it, it is a completely inapposite case.

Instead, the cases that deal with this situation are crystal clear that if you are going to allege it is the same market you have to allege facts to prove it, to show it, and there is no fact, not one, to support that bald assertion in this complaint. In fact, the sparse facts in the complaint which say what these products are show it is exactly not the same thing. Clearly, wire -- you know, automotive wiring is not a body ECU. A body ECU is a little

computer. You can't stretch that out and use it as automotive wiring, it is completely different things.

THE COURT: And do you think the fact that it is mentioned in the two other -- in the Furukawa and Yazaki plea makes any bit of difference at all?

MR. CHERRY: No. I mean, heater control panels are mentioned in our plea, that doesn't mean they can sue somebody here who just makes wire harnesses for heater control panels. You know, we had conduct involving two products that we sell, those are markets we are in. Other people had conduct perhaps involving other products that they are in that have nothing to do with us, just as heater control panels may have nothing to do with them, so I don't believe that's the case.

I think that's it. I mean, I think the law is clear. There is absolutely no facts to support their position.

THE COURT: Okay.

MR. CHERRY: Mr. Kohn brought up the idea of a separate product track. I think that is sort of a starting point here for any claim against --

THE COURT: We are not going there yet.

MR. CHERRY: Well, I mean, it clearly is something separate. I mean, you know, heater control panels is in our plea too and that's clearly a separate product track, but in

any event, there is no showing of an overarching conspiracy.

I also just want to make the point that the law is clear here. Plausible, you have asked a few times what plausible is. The law isn't real clear in defining what plausible means, but it is pretty clear on what it doesn't mean, and the cases are clear, it is not speculative and it is not merely possible. I think it gets thrown around a lot in place of possibility, like who knows, maybe discovery will show that, who knows, but the fact is they have to allege facts that give rise to a reasonable inference that this is, in fact, what happened, and they are totally lacking in our complaint.

THE COURT: All right. Thank you. All right. Now we have the Lear bankruptcy. I'm willing to stay if you want to proceed on it or you want to go to lunch?

MR. MAROVITZ: Judge, Andy Marovitz for Lear.

The argument is a combination really of the bankruptcy and the pleading standard, and it will go -- I think the Court allocated 40 minutes per side, and I think it will go 40 minutes per side.

THE COURT: Okay.

MR. MAROVITZ: So I'm happy to do it now or do it after lunch, whichever you prefer.

THE COURT: I think we will break for lunch because that will be another -- okay. All right. Let's -- it is

12:30, let's meet back here at 1:45. Thank you.

THE CASE MANAGER: All rise. Court is in recess.

(Court recessed at 12:32 p.m.)

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(Court reconvened at 1:53 p.m.; Court, Counsel and all parties present.)

THE LAW CLERK: All rise. United States District Court is again in session. You may be seated.

THE COURT: Good afternoon.

ATTORNEYS: (Collectively) Good afternoon, Your Honor.

THE COURT: I'm glad you all came back.

MR. MAROVITZ: I was worried when you mentioned bankruptcy the crowd may be much smaller.

THE COURT: Yes.

UNIDENTIFIED PERSON: It is.

THE COURT: It is. You know, it is an exciting topic. For the record again, your appearance.

MR. MAROVITZ: Thank you, Your Honor. Andy Marovitz for Lear Corporation.

My colleague, Howard Iwrey, is here with me today as are Terry Larkin, Lear's senior vice president and senior counsel, and Harry Kemp next to him, the vice president and divisional counsel for the electrical power management system. I'm going to try to reserve about 10 minutes of the

40 combined for reply.

THE COURT: All right.

MR. MAROVITZ: Your Honor, plaintiffs' pursuit of Lear in this case violates bedrock principles of bankruptcy law, antitrust law and federal pleading. There are no properly pled facts against Lear in any of the three complaints. There is no guilty plea, there is no DOJ investigation, there was no raid, there is nothing against Lear that ties Lear against any alleged conspiracy in the case.

Mr. Kohn this morning discussed the importance with Your Honor of the FBI raids based upon a judicial officer's review of the situation and authorization of FBI subpoenas. None of that occurred with respect to Lear.

Mr. Kohn this morning talked about the importance of guilty pleas and the fact that there was ongoing cooperation with respect to those people who had pled guilty, and he mentioned Furukawa, Denso, Yazaki, Fujikura and GS Electech, none of that relates to Lear. Even after that investigation has taken place, none of that relates to Lear.

Plaintiffs' entire pleading against Lear is one of guilt by association. The reputational and economic harm to the Southfield, Michigan based company which only three years ago was able to climb out of bankruptcy cannot be justified on any ground. It is an expensive and burdensome litigation,

fishing expedition based upon the conduct or alleged conduct of others.

Keeping Lear in this case sends a signal that any time there is a guilty plea in any industry there is a green light to sue everybody in the industry. That shouldn't be the law and it isn't the law, and, in fact, throughout this morning's proceedings despite hearing about many other competitors in the industry plaintiffs didn't mention Lear once.

Accordingly, as we walk through the bankruptcy and the pleading issues, it is important not simply to allow any party to throw around conclusory labels about conspiracies but instead to look at exactly what actually is pled with respect to Lear, and we are going to go through that in just a minute.

First, it is important to define what is in dispute here, particularly given Lear's bankruptcy and the proceedings in the bankruptcy court. One thing is worth mentioning, this Court only needs to reach the bankruptcy-related issues at all if, in fact, it finds -- if it believes that the plaintiffs have pled some claim against Lear in the first instance. If the Court finds, as we believe it should, that plaintiffs have pled no claim over any period of time as against Lear the Court doesn't even need to reach the bankruptcy issues, but let's talk about the

bankruptcy issues in the first instance.

Following the global financial crisis of 2008, which had a severe impact on the U.S. automotive industry, Lear underwent a transformative event in November of 2009. It was able to keep its doors open, its employees working, its customers up and running and its suppliers paid during a successful Chapter 11 bankruptcy under 11 U.S.C. 1141 which reorganized the company and discharged all of the company's debts that arose before November 9th, 2009.

Because of that bankruptcy there is no dispute between the parties that predischarge conduct cannot give rise to claims against Lear for liability. And so, Your Honor, I've handed up a packet of demonstratives, maybe seven or eight slides, to your clerk and I think to you, and I also blew up a couple of those slides just for demonstrative purposes.

If you look at the left side of the slide --

THE COURT: Let me ask you one question to be clear about this, the district court opinion in Lear, the appeal took care of the predischarge issues here?

MR. MAROVITZ: The district court opinion in the Lear appeal essentially is an opinion that discusses whether -- to put it commonly or easily, the amount of damage.

THE COURT: Right.

MR. MAROVITZ: That is nobody alleges -- if I can come around here, nobody alleges that this period of time, anything before November 9th, 2009, conduct undertaken in this period of time, can give rise to liability as to Lear.

THE COURT: Right, but as to the damages --

MR. MAROVITZ: Correct. The district court is going to consider whether as a matter -- has sent back to the bankruptcy court to consider whether as a matter of bankruptcy law a properly pled complaint against a real antitrust violator could, based upon these three months, this little snippet in turquoise here, could somehow seek damages for this entire period as a matter of law under bankruptcy law. We say it can't but that's a question for the bankruptcy court, not for this Court.

THE COURT: Just to look ahead as to one possible scenario, if the bankruptcy says, yes, it could, it would come back here for the damages issue or would --

MR. MAROVITZ: The bankruptcy court would only reach -- I think the bankruptcy court might reach that issue in the event that plaintiffs were able to properly plead a cause of action against Lear.

THE COURT: I understand that, but I just wonder if all of those things fell into place whether or not it would get back here anyway?

MR. MAROVITZ: Yes, I think so. I think if there

were a proper pleading against Lear and if the bankruptcy court decided that somehow a claim in this early period which is dead as a result of bankruptcy could, like a phoenix, spring back to life, if that happened then ultimately the plaintiffs would not be enjoined from pursuing this case here for this period of time for the damages only, not for the liability.

THE COURT: Right. Okay.

MR. MAROVITZ: So that's really the red stop sign on the other chart. The conduct at issue here is the postbankruptcy discharge, liability there is in dispute.

The first real issue, as I've mentioned, is the pleading issue, whether or not the plaintiffs have properly pled anything as against Lear. What makes this case unique is the fact that because of the bankruptcy issue and the discharge in November of 2009 it really is able to help define what's at issue before this Court. The plaintiffs have to show that there has been some allegation properly pled in this window of time. Allegations over here pre-November 2009 are all discharged, the acts are discharged, they have to show something in their complaint that they have alleged post-November of 2009 that Lear did something to conspire to fix prices, to rig bids, et cetera. That's what makes this case unique. They don't do it, and that's what I'm going to walk through in a few minutes.

Let's start at the beginning. We have already spoken a bit today about the Twombly and Iqbal plausibility standard. Your Honor has asked a number of questions about what the plausibility standard means, and I won't repeat any of that. I would like to focus on a different aspect of particularly Iqbal. What I have done in the third slide that is in the packet, Your Honor, is I have essentially excised a couple quotes from Ashcroft vs. Iqbal that apply directly to the Lear situation. What hasn't received any attention really in plaintiffs' briefs is Iqbal's insistence that labels and conclusions, words like participated in a conspiracy, are, as the Court said, disentitled to the presumption of truth. So as the slide shows, a pleading that offers labels and conclusions or a formulated recitation of the elements of the cause of action will not do.

We cite a number of cases in our briefs for that proposition, and this morning the counsel for the plaintiffs said well, we don't have to tie each and every defendant into the conspiracy as long as we can show that there is some conspiracy going on. That's just not right, Judge. That's not the state of the law in the United States or in this district.

On page 3 of our opening brief we cited in re Refrigerant Compressors which cited the Sixth Circuit's decision in Carrier Corp. They must specify how each

defendant was involved in the alleged conspiracy. And in in re Refrigerant Compressors, quote, the allegations in the complaint must be specific enough to establish the who, what, where, when, how and why of the conspiracy. That's a quote from that case.

So the Court should not indulge any presumption for conclusory pleadings like plaintiffs' undefined general allegations that everybody is involved in some kind of a conspiracy somewhere. Here we should turn to the specific overt acts that the plaintiffs claim that Lear engaged in, and there are really only -- they fall into three categories, and I have put them on the board to my right and they also appear in the handout that I have submitted. Just to walk through them, the first are prosecutions and investigations. Guilty pleas by others, DOJ investigation against others, and an E.C., European Commission, investigation and statement of objection against others. That's the first bucket of overt acts they say. All of this conduct that is being investigated against other people, not Lear.

Second is Lear's postdischarge 20 percent share in a separate Delaware corporation, Furukawa-Lear, called the joint venture loosely, and we are going to go through that in a minute.

And then third, Lear's postdischarge marketplace wire harness sale to customers. Just like any other

manufacturer who sold wire harnesses, Lear sold wire harnesses after its bankruptcy, so that's the third and final overt act. That's it against Lear, there is nothing else in either the complaint or in the briefs.

So let's go to what I like to call the guilt by association argument number one, law enforcement actions against others. We have already talked about the fact that the guilty pleas by others don't touch upon Lear, and Lear doesn't have to argue about the scope of the guilty pleas or whether the scope of the conspiracy is limited to some other product or platform or model. Lear didn't plead to anything, Lear's employees didn't plead to anything.

We host -- we cited a host of cases in our brief demonstrating that in this country guilt by association is an insufficient basis to file a lawsuit against someone, and I mentioned those just a minute ago.

Lear hasn't even been investigated by the Department of Justice. Plaintiffs know this, we included the letter notifying them of this fact as Exhibit B in our reply.

Now, on the European Commission investigation it is important to remember that this is a key point in the end payor and the automobile dealers brief. You may remember, Judge, that the plaintiffs stressed this point in their counter statement of issues presented, it is a little Roman five in their brief. If you take a look you will see the

European Commission statement of objections and investigation is the only thing that the indirect plaintiffs cite as being part of their counter statement.

Now, number one, as I think it was Mr. Cooper pointed out earlier, that's insufficient as a matter of law and the Elevator antitrust litigation case makes clear that you can't simply say if something happened there it also happened here, but now we know that it didn't even happen to Lear. In our reply brief we identified the fact that the European Commission has already notified those entities against whom it is going to file a statement of objection, and Lear and Lear France were not so notified. So the European Commission investigation statement of objection falls out completely. There is nothing in A that could tie Lear to any conspiracy here.

The second point that is in the bucket of the three allegations is the postdischarge share in a separate Delaware corporation, Furukawa-Lear. The dealer complaint identifies this at paragraph 96. The problem with the argument that somehow Lear should -- is plausibly connected to a conspiracy because it is in a joint venture with another company that actually pled guilty is that it is not a common loosey-goosey joint venture or partnership at all. It is a separately incorporated Delaware company entitled to all the rights and privileges of a corporation to be shielded from exactly the

kind of lawsuit that the plaintiffs are bringing here.

In fact, the dealer complaint at paragraph 96 pleads that Furukawa-Lear is a separately incorporated company and as a result of that, of this corporate forum, like every other company duly incorporated under Delaware law, means that you can't sue shareholders for the acts either of the corporation or of another shareholder, in this case Furukawa.

In Longhi vs. Animal and Plant Health Inspection, a Sixth Circuit case from 1999, which we cite at page 4 of our reply, the Sixth Circuit wrote that Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate forum in order to pierce the corporate veil.

Plaintiffs here don't even allege that the veil should be pierced because their brief doesn't even acknowledge there is a veil. They plead, as I mentioned before, that it is a corporation but their briefs cite cases like Schutze vs. Springmeyer that address this as though it is a partnership or a loosey-goosey joint venture, when it is not. Plaintiffs have no answer to the fact that the separate Delaware corporation, Furukawa-Lear, is, in fact, its own corporation and therefore Lear cannot have as a matter of law any liability for any acts it may or may not have undertaken.

Incidentally, that joint venture did not plead

guilty to anything, but aside from that the fact is that Lear can't have any liability for any act of it.

THE COURT: So basically you are claiming the only thing they have against you is the fact that you are a member of the industry?

MR. MAROVITZ: Yes, yes. We have the fortune of having survived a successful reorganization in bankruptcy and the misfortune in some sense of because we have survived it we have now been sued because we are a member of the industry. What they claim in their third bucket is that somehow the post-discharge marketplace wire harness sales, because we are a member of the industry and because we've sold things that somehow that continues a conspiracy that they don't allege previously but somehow we should still be on the hook.

THE COURT: But that you sold things at a heightened price?

MR. MAROVITZ: I suppose that's right. It is not entirely clear from the complaint, but I suppose that's right. There are two problems with that argument. First of all, there is no link obviously between any conduct that we've taken and what the price is. And antitrust law is clear that we are entitled to sell at any price we wish so long as we don't reach a conspiracy or an agreement with a competitor to do it. The plaintiffs claim somehow that a

higher price effected by something called umbrella liability, that other people have raised their price through a conspiracy and we then as a competitor simply took account of that and matched the price, that is not unlawful, can't be unlawful, and no court in the country as far as I know, certainly not the Sixth Circuit, has said that it is unlawful.

And second, they have also said that somehow these post November 2009 sales have caused this earlier conduct over a period of ten years to, like I said before, spring back to life like a phoenix rising from the ashes. It is important to understand, and I know that Mr. Cooper started to make -- but I think that the nature of the automobile industry and the bid process is really important to understanding why that point C doesn't hold water even in the matter of pleading.

Plaintiffs' own complaint alleges that each bid is submitted on a model by model basis and that it takes three years from the accepted bid to the actual delivery of the harness. Crediting that allegation, any overt act, whether a bid or a sale, as against Lear must have occurred prebankruptcy and therefore is discharged because November 9th was just about three years from today and they filed the complaint long ago. I'm going to get to how that process works in just a second.

Second, plaintiffs' allegations are barred by blackletter bid-rigging law which makes clear that the overt act in a bid-rigging case is the bid process itself, it is not some subsequent sale or some subsequent delivery but simply if the bid occurred before November 9th that's the overt act and there can be no liability.

Third, even if this weren't a bid-rigging case, the Sixth Circuit in Travel Agents and another district court in this circuit already have rejected exactly the arguments that plaintiffs are making, that somehow a postbankruptcy discharge sale of this kind causes a dead claim to spring back to life or that it somehow nullifies the bankruptcy discharge altogether.

Fourth and maybe as a policy matter most importantly, the logical consequence of plaintiffs' argument is that every debtor that has the benefit of a postbankruptcy discharge, it is able to keep its doors open, its employees working and its customers supplied, it would have to stop and abrogate all contracts going forward so that no one could claim somehow that a postbankruptcy sale could trigger prebankruptcy liability. That result is completely anathema to Chapter 11 bankruptcy policy and what a reorganized debtor is supposed to do, and that is to continue the business for the benefit of its stakeholders who agreed in some instances to take less than the full amount of their credit, to the

businesses that they serve and to the employees that they employe.

Plaintiffs can never get that far here, as I have mentioned, because they haven't alleged an overt act either before or after the discharge, but let me spend one quick minute on the timing of the bid because I think that's an important point, and I did do a slide on that. If Your Honor will turn to the third or fourth slide, it is called plaintiffs' complaints, timing of bid process. We have taken a snippet out of each plaintiff's complaint, the direct plaintiffs, direct purchasers, the dealers and then the end payors, and they all tell not surprisingly a similar story; they say that the bidding process begins approximately three years prior to production of a motor vehicle. So bids are made on a model by model basis. The bid is either accepted or rejected at which time the sale occurs. Three plus years later the wire harness is actually delivered when the model is -- after the model is engineered and constructed, so it does not happen at the time of the bid, it is a very long process as the plaintiffs make clear in their complaint.

The reason that is important to Lear and Lear's motion here is that under the theory that plaintiffs have pled the OEMs wouldn't even start production of their automobiles that might be affected by postbankruptcy conduct

until three years after the bids, and sales were made on November 9th of 2009. Plaintiffs have no answer to this because there isn't one.

The second point that I raised and foreshadowed before is that the bid-rigging law is different in some respects than simple sales. The law on bid rigging is that the overt act is the rigging of the bids, not the payments on the bid, not the, quote/unquote, sale. We cited a series of cases in our opening memorandum at page 10, at page 14, and in our reply at page 2 and 12, like City of El Paso show that bid-rigging cases, the overt act is the rigged bid itself. In El Paso, for example, the court considered a joint bid amongst steel fabricators, the bid was signed in 1970, the statute of limitations ran, the city didn't sue until 1975, and the plaintiff said its suit was still within the four years because of payments made in 1974. Does that sound familiar? That's exactly what the plaintiffs are alleging here. The Fifth Circuit rejected this argument completely ruling that the rights and liabilities of the parties were finalized by the contract signed on September 4th, 1970.

In El Paso the statute of limitations cut off liability. In this case the bankruptcy discharge cuts off liability, and because of the three-year process there is no way as a matter of math Lear could somehow be responsible.

Plaintiffs cite zero bid-rigging cases, zero, to

suggest that we are wrong about this. Instead they say that a case from the Supreme Court called Klehr, which isn't an antitrust case, it isn't a bankruptcy case, it isn't a bid-rigging case, somehow overruled these cases and yet these cases occurred, as you will see in the brief, both before and after the Supreme Court decided Klehr.

THE COURT: I'm trying to think about what the bankruptcy court decision could have covered if, in fact, your argument is that it would be impossible to have a future overt act because of this bidding process, why would not the bankruptcy court have decided that?

MR. MAROVITZ: I don't want to speak for Judge Gropper or for Judge Forrest, the judge in the Southern District, but my interpretation of that is that they were focused on the core bankruptcy issues and the core legal issue under the bankruptcy rules, which is whether or not once there is a properly pled allegation against a defendant whether, in fact, you can go back in time under the bankruptcy law and try to rope back in this earlier conduct. They did not, number one, deign to address the antitrust implications of that, and, number two, they didn't even want to get to the pleading itself, which, of course, is the province of this Court, and that's why I think the parties have tried to separate the two issues so that the bankruptcy court did what it's expert at and the parties are asking the

Court to do what it is expert at.

Third, the Court doesn't have to write on a clean slate here. The Sixth Circuit and a district court in the Sixth Circuit have already considered this question. In the Travel Agents litigation, which has been discussed a little bit this morning for pleading purposes but not for bankruptcy purposes, and the Sixth Circuit decision in Travel Agents is, of course, real precedent. In Travel Agents the situation was that travel agents' commissions were reduced that resulted in airlines eliminating commissions in March of 2002 reducing the commissions to zero essentially. United declared bankruptcy in December of that year, 2002, and the plaintiffs sued after that in April of 2003, and the United bankruptcy plan was confirmed in 2006. The plaintiffs in Travel Agents claimed that United's decision postbankruptcy to continue the conspiracy commission rate of zero percent to travel agents was somehow an overt act that put United back on the hook just as plaintiffs here claim that these sales that we made postdischarge were overt acts that somehow put us back on the hook, even though all we were really doing was honoring previous commitments to customers.

The Sixth Circuit completely rejected this argument, and I created a slide but I won't take the time to go through it, it is quoted in our brief, but it is the next slide. In particular, if you look at -- I guess the fourth

point is the only one I will go through, it is the Travel Agents slide, and it says here we reject plaintiffs' attempt to characterize United's decision to maintain its zero-percent commission policy as an overt act.

Now, the plaintiff says, well, it really wasn't a new act, it is just that United refused to pay any commission so it is an inaction, but the harm to the travel agents was the same, they claimed that as a result of a conspiracy they weren't getting paid. And the language that the Sixth Circuit uses makes clear that plaintiffs' interpretation is not correct. In the top bullet we cite that language, and the Sixth Circuit says specifically plaintiffs contend that United's decision to, quote, continue, end of quote, not my language but the Sixth Circuit's language, continue the conspiracy commission rate, which at this point was zero, after its reorganization created a new Section One claim under the Sherman Act.

So plaintiffs are asking you to interpret this case in a way that is contrary to its language and contrary to common sense. Imagine, Judge, if you would, that the commission rate wasn't zero but instead was .000001 and United went back do that same rate. The plaintiffs' argument -- they couldn't make that argument because now there is an action, there is a .000001 commission rate, but the fact is that the commission is still tiny, whether it is

zero or tiny, and the fact is that the travel agents would still be saying exactly the same thing, they have been harmed by a continuation.

Other cases from the Sixth Circuit, and we cite Grand Rapids Plastics at our opening brief at 14 and reply brief at 12 to 13, say exactly the same thing.

All plaintiffs can say about this is cite the Klehr case, K-L-E-H-R. And Klehr isn't even an antitrust case, it is a RICO case in which a dairy farmer bought a silo in 1974 to store cattle feed and didn't bring his action until 1993, well beyond the statute of limitations. The Klehrs in that case allege that the company made continuous misrepresentations that kept restarting the statute of limitations.

Plaintiffs, in referring to the sale in Klehr, make no mention of the kind of RFQ delivery process that I have just gone through here. It is a totally different situation and, in fact, the plaintiffs don't even focus on the language that the Supreme Court used to reject plaintiffs' claim in Klehr. Plaintiffs in Klehr lost, and the reason that they lost is because, and if you look two slides over, the court said the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside of the limitations period, so think about the way that that applies to this case.

The statute of limitations in Klehr is the equivalent of a bar and in that respect is no different than a bankruptcy bar; once the old overt act is barred, whether by the statute of limitations in Klehr or by the bankruptcy discharge in our case, it is done, you can't go back and try to assert liability for that period. The court continued, as we wrote -- as we noted in that same opinion, as in the antitrust cases the plaintiffs cannot use an independent new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside of the limitations period. That is our case where any kind of alleged action that the plaintiffs might claim prebankruptcy can't have anything to do to hold us in this case.

The bankruptcy discharge is just like the expiration of the statute of limitations in Klehr, and the Supreme Court in Klehr made clear that you can't somehow spring this back to life.

We referred to the Lower Lake Erie case in our brief because the plaintiffs have referred to that as somehow allowing this kind of claim. Lower Lake Erie is a case in which Conrail was -- there was an effort to hold Conrail responsible for an entire conspiracy period because of its monopolization of transportation of iron ore, that was the allegation, but that was based on a very specific statute, not the Sherman Act but a very specific statute, and this

whole issue was created as a result of the consolidation of the rail industry.

That statute, which we have included on the next slide, makes clear that if certain conditions are met then the antitrust rules essentially don't apply. If you look at the one that is in re Lower Lake Erie Iron Ore antitrust litigation, part of the statute, section 1, says except as specifically provided in paragraph 2, no provision of the chapter shall be deemed to convey to any railroad or employee or director any immunity from civil or criminal liability.

And then part two it says, the antitrust laws are inapplicable to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan.

The plaintiffs say that language tells us that somehow there is a policy of allowing antitrust law to trump bankruptcy law, but it couldn't be further from the truth. This case, Lower Lake Erie, makes clear that the opposite is true because in Lower Lake Erie, section 601 has a very specific exception for the application of the antitrust laws. It says essentially that you get a free pass so long as you comply with a specific part of the statute, and otherwise you don't. The bankruptcy law is exactly the opposite. Everything in the bankruptcy law gets discharged, that's the point of the discharge, all debts are discharged. In the

environmental context, in the employment context, there oftentimes are continuing sources of liability that happen before and after the alleged discharge, and in those series of cases everything before is still discharged.

So in re Lower Lake Erie is exactly why our case shows that the plaintiffs can't go ahead and say that there is somehow an exception for antitrust law. The bankruptcy code contains no exception for bankruptcy (sic) law. Everything is discharged for us on that November 9th, 2009 date.

Finally, Your Honor, plaintiffs' argument if adopted would require reorganized debtors to walk away from all of their contracts and therefore be in breach if they happen to manufacture products in an industry with competitors that are being investigated for antitrust violations even if the manufacturer is not. It is not enough for plaintiffs to get up and say, well, you could avoid it by not doing it. All right. We haven't pled guilty, we haven't been investigated, we haven't had a search warrant.

This is a situation where we are in this case because we make wire harnesses, and it is exactly that situation that goes firmly to why the bankruptcy discharge and giving stakeholders who invest postbankruptcy a chance for the company to succeed.

THE COURT: Now, did the defendants -- the

plaintiffs are saying that each sale postdischarge is an overt act, right, each one?

MR. MAROVITZ: That's what they say.

THE COURT: And you are saying that that's impossible and -- well, under the commission case and the Travel --

MR. MAROVITZ: The bid-rigging case, yeah, because the --

THE COURT: Because the plan was made predischarge, the request --

MR. MAROVITZ: The request for quote would have been predischarge.

THE COURT: Okay.

MR. MAROVITZ: That's right. The bid-rigging cases say that's the overt act that you look at, and it was discharged. But in any event, you only get to that question if there is actually something that the plaintiffs can stand up and say that Lear did. You know, that somehow we attended a meeting or that there is a guilty plea against us or that, you know, we somehow are involved in the conspiracy. They don't ever get to that point, that's the problem.

Mere sales can't be enough to keep Lear in this case. As we said in the brief, zero the guilty pleas plus zero the joint venture plus zero postdischarge sales still equals zero.

I want to return in conclusion to the three issues that we raised in our original flowchart. For the first two issues we've seen that there is nothing there, and for the third issue we have learned that bid rigging and straight sales don't constitute affirmative acts and that they can't justify taking debts that have been discharged and having them spring back to life.

There is simply no case law supporting plaintiffs' position on this. I have one -- if I can hand this up, Judge, I have one more slide that didn't make it into our packet. I will give copies to counsel as well.

So these are the basic arguments that are left for the Court at the end of the day: Can plaintiffs impose predischarge damages for postdischarge anticompetitive conduct? Plaintiffs cite zero cases on that point to support it.

Postdischarge sales, can they be overt acts in furtherance of predischarge -- in furtherance of predischarge conspiracy? Again, zero cases on that. Klehr does fit that box, there's no conspiracy in Klehr.

Overt act was a later sale of a product, not the rigged bid. Again, zero cases on that from plaintiffs.

Then finally whether or not you can have liability against a shareholder for acts of a separately and duly incorporated company. Again, zero cases. The European

Commission investigation question doesn't even make this chart anymore because it has been shown that Lear wasn't part of that.

Final, Lear shouldn't be here. Its need to defend this action is affirmatively harmful to its postbankruptcy efforts. Even after all of the work that plaintiffs undertook to prepare this case, including the work they described in detail in previous court appearances, there isn't any support for keeping Lear in this case. Lear should be dismissed with prejudice now. Thank you.

THE COURT: Thank you. All right. I think we are going to hear another side to this?

MR. FINK: Your Honor, Bernard Persky is going to be arguing both for the direct and for the indirect plaintiffs on the bankruptcy issue, and then Joe Kohn will speak for the directs on the Twombly issues that remain.

MR. PERSKY: I will try to do the Twombly issues too, and if I leave anything out Mr. Kohn will supplement that.

I will be getting into the bankruptcy issues as well but I wanted to at least initially clarify the pleadings, the allegation against Lear. We have pleaded that they are part of the conspiracy, we have pleaded that they have made sales of wire harnesses pursuant to that conspiracy.

THE COURT: But how do you address --

MR. PERSKY: In furtherance of that conspiracy and at super competitive pricing. I will get into detail in a second, but we have said they are part of the conspiracy. What do we have in support of that aside from the fact that they sell wire harness products? Well, there have been multiple guilty pleas by multiple defendants including, and this is fairly important, Furukawa.

Now, Furukawa has pleaded guilty to the felony of price fixing with respect to wire harnesses. Lear has been a partner of Furukawa for more than a decade and, indeed, Lear was the majority joint venture -- owner of that joint venture in terms of 80 percent versus 20 percent ownership of -- by Furukawa. After the effective date of the bankruptcy, Lear continued to partner with Furukawa in the sales of wire harnesses.

THE COURT: Wait a minute. Lear partnered with --

MR. PERSKY: With Furukawa.

THE COURT: Furukawa.

MR. PERSKY: Furukawa is the admitted felon, the defendant that has admitted to price fixing wire harnesses.

THE COURT: But Furukawa was the separate --

MR. PERSKY: No. The Lear -- the Lear-Furukawa joint venture is a defendant in this case. There is case law contrary to the case law that Mr. Marovitz said that

indicates that a joint venturer who participates in the unlawful acts of the joint venture is liable with the joint venture partners. These are, in essence, partners in a joint venture and we have cited cases to that effect.

So the fact that, one, Lear sold wire harnesses itself postdischarge and predischarge at super competitive prices pursuant to the conspiracy, and separate and apart from its own sales of wire harnesses it partnered with an admitted price fixer in a joint venture, and we have cited cases to indicate that one joint venturer is liable for the other joint venturer's unlawful conduct.

THE COURT: Wait a minute. I'm just a little bit confused on that relationship. I thought that was a separate corporate Delaware entity?

MR. PERSKY: Yes. We pleaded it as a joint venture, and they treated it as a joint venture, and we have cited cases indicating that where an entity proceeds as a joint venture the joint venturers are jointly and severally liable for their joint unlawful activities, and that's what we believe is true with respect to Lear. So it is not just --

THE COURT: How did they proceed as a joint venture versus a separate entity?

MR. PERSKY: They made a joint venture entity which at one point Lear was an 80 percent owner and then after the

effective date it was a 20 percent owner. That entity made sales of wire harnesses at price fixed -- at super competitive prices, so Lear was not just selling on its own we say at super competitive prices, it was partnering with somebody who is an admitted price fixer. So that's a further fact to support the plausibility of keeping Lear in the case. We have to prove it but we have alleged it. It is more than -- it is not entirely accurate to say that Lear is not under investigation. We have not alleged that Lear is under DOJ investigation but at paragraph 167, for example, of the end payors' complaint we allege that Lear's chief executive officer, Bob Rossiter, has stated that Lear was notified by the E.C., that's the European Commission, the European antitrust authorities, that it is part of an investigation into anticompetitive practices among automotive electrical and electric component suppliers. Why is that important? Well, they might not have been yet charged but they are under investigation, and we say that when a company is admittedly by its president under investigation with respect to the sale of the products that are the subject of this suit we don't have to wait until charges are filed, charges may or may not be filed by the Government authorities, there's a lot of reasons why Government authorities don't file charges but civil claims can be brought. And the fact that Lear has stated it's under investigation, has partnered with an

admitted price fixer and sells separately and apart from the joint venture the same product in a concentrated injury -- in a concentrated industry, all of which lends character to our complaint and all of which supports that we have satisfied Twombly's pleading requirements to make it more plausible that --

THE COURT: Tell me when was Lear -- when did Lear's CEO say this?

MR. PERSKY: Sometime after February of 2010.

THE COURT: This investigation is still ongoing?

MR. PERSKY: I believe it is ongoing. I think Mr. Marovitz may be contending that the investigation has not resulted in charges against Lear or any of Lear's subsidiaries such as the Lear subsidiary in France. We have no such information. What we have pleaded is that Lear is under investigation for sales of these products, wire harness products, so it is not just that we have brought them into the case because they happen to be in the industry; one, they partnered with the felon, Furukawa, in the sale of these products; two, we say they have sold these products themself at price fixed products; and, three, they are under investigation by a Government antitrust authority, not the United States Government authority, yes, no charges have been filed but that's not, we say, necessary in order to satisfy Twombly.

Getting back to the beginning questions here, does Lear's bankruptcy discharge immunize it from antitrust liability for its post-effective date unlawful acts? Well, if that were true we wouldn't be here, Your Honor. Lear made a motion to the bankruptcy court making precisely the same contention that they could not possibly be subject to this suit because their sales were somehow immunized postdischarge because of the discharge that it got. That was rejected by the bankruptcy judge. Indeed, he deferred to this Court as to the scope of Lear's possible liability.

They took an appeal to the Southern District of New York. That argument was again rejected. What the Southern District of New York court judge did was to say it was a mistake by the bankruptcy court not to have interpreted the discharge so as to decide once and for all what could the scope of Lear's liability be if, one, it was found to have engaged in posteffective date unlawful conduct. If it has what could the scope of that liability be? One, if it turns out that it has engaged in posteffective date unlawful conduct can Lear's liability for damages extend for -- to damages for its predischarge conduct? Does its discharge for its predischarge conduct immunize it from the damages that were caused by its predischarge conduct if it was guilty of joining the conspiracy postdischarge? That's question one that it remanded -- the court remanded to the bankruptcy

court.

Two, separate from that question, if Lear and its co-conspirators engaged in postdischarge unlawful conduct under the antitrust laws, could Lear be jointly and severally liable for the predischarge conduct of its co-conspirators? Those questions have been left open.

We have a status conference before Bankruptcy Judge Gropper in the Southern District of New York on December 10th. That court will let us know if it wants further briefing on the issue, but let's get back to the basic question that Mr. Marovitz was trying to raise. It clearly is not immunized from its postdischarge conduct by the bankruptcy discharge because if it was we wouldn't be here. The question is have we properly pleaded postdischarge unlawful conduct? We think we have, Your Honor.

Let me go into some of the conduct that we have pleaded. Indeed, we think that --

THE COURT: Sold at inflated prices so go by that one.

MR. PERSKY: One, postdischarge, it chose to continue to make sales under contracts that we say are reflective of an unlawful conspiracy. The discharge cannot possibly immunize that because it didn't have to continue to sell at super competitive prices pursuant to contracts for which it was discharged. It could have stopped its unlawful

conduct. It voluntarily chose to continue to make sales of price-fixed products at super competitive prices continuing --

THE COURT: But let's say it didn't engage in this conspiracy --

MR. PERSKY: Then it shouldn't be.

THE COURT: -- how would it know what the price should be?

MR. PERSKY: We will have to demonstrate that its participation in the conspiracy resulted in super competitive prices. It is claiming that it was discharged. However, if we are correct that the people running Lear, both before and after its discharge, continued to make sales under the contracts that we say were unlawfully entered into, it chose to continue to violate the law, it chose to continue to participate in the conspiracy. The discharge doesn't permit it to do that. It would have to stop and sell it at competitive prices instead of super competitive prices.

Indeed, each sale was an overt act, each sale continued to inflict injury on the class, continued to add to Lear's unlawful profits, and had the sales not been made the classes wouldn't have been injured. So one of the issues that Judge Forrest raised that she's remanding to the bankruptcy judge is, gee, if Lear continued its unlawful conduct then certainly if it did continue its unlawful

conduct it would be under antitrust law and conspiracy law principles jointly and severally liable for all the damages caused by the co-conspirators during the entire period of conspiracy. That's not in dispute. Judge Forrest held that. Judge Gropper, the bankruptcy judge, assumed it, and left it for your court -- for Your Honor to decide if an antitrust claim has been stated.

What the bankruptcy judge is being asked to decide is to weigh the policy of the bankruptcy laws to grant a discharge and a clean slate against the moral hazard that would be created by allowing a co-conspirator who chooses to participate in the conspiracy to have less liability than its co-conspirators. Judge Forrest in a footnote pointed that out, those are the policy questions the bankruptcy judge would have to decide in determining the scope of the discharge. Does the discharge prevent Lear from being held liable for either its own unlawful conduct predischarge if it is guilty of postdischarge antitrust violations? Does the bankruptcy discharge present Lear from being held liable jointly and several for the activity of its co-conspirators predischarge? That's being remanded to the bankruptcy.

We would like to think, Your Honor, but that's up to the Court for its decision that this isn't a core bankruptcy law question. We persuaded the bankruptcy judge to defer to Your Honor that it is a core antitrust issue. We

still believe that, but it is up to Your Honor to decide if it wishes at any point to defer to the bankruptcy court when it determines the remand questions. Those remand questions, as I mentioned, are set forth in Judge Forrest's order, the possibility of Lear's liabilities for predischarge damages because it joined a conspiracy postdischarge.

As we have said, we have alleged that Lear, its posteffective date conduct involved selling wire harnesses pursuant to and as part of and in furtherance of the unlawful conspiracy. After November '09 Lear had significant sales of wire harnesses in the United States we allege at super competitive prices and profited from these unlawful acts and sales and continued to inflict injury on plaintiffs and the classes.

We have also alleged in addition, and separate and apart from those sales, that Lear actively participated in the joint venture with Furukawa post November '09 through June 2010, and that company, Furukawa, has pleaded guilty to price fixing this product. Lear's CEO, as we have indicated, admitted that Lear was under investigation by European antitrust authorities.

The Supreme Court Klehr case and other cases that we have cited indicate that it is blackletter law that in a continuing price-fixing conspiracy each sale of a price-fixed product is a separate overt act giving rise to antitrust

claim, and that's what we allege in our complaint, that it continued to make these sales. It voluntarily chose to participate in the conspiracy and to inflict injury on the classes involved in this case and to profit from such unlawful conduct. That's the very purpose of the conspiracy, they didn't have to continue, they voluntarily chose to do that, that makes them liable posteffective date and we say under antitrust principles and conspiracy law principles liable for damages caused by the entire scope of the conspiracy from the beginning of the conspiracy.

Lear has not alleged that it ever withdrew from the conspiracy, that would be one possible defense. A bankruptcy discharge is not a withdrawal from a conspiracy nor do they allege that they withdrew from the conspiracy. We don't think that the Travel Agents case is in point for them. The only posteffective date conduct alleged in the Travel Agents case was inaction, the failure to change a policy; they merely failed to change their zero commission policy that was already in place. That was in the Travel Agents case.

Here there are numerous overt acts. Each sale at a price-fixed price or pursuant to the bid-rigging conspiracy was an overt act posteffective date.

In Travel Agents the final act to effectuate the conspiracy occurred --

THE COURT: Wait a minute. Before you go on with

that, defense cites -- Lear cites a number of cases regarding the fact that the -- it was the bid, the request for the proposal that really was the overt act, not each subsequent sale. And I -- can you distinguish your --

MR. PERSKY: Well, unless there was a sale there would have been no injury. Unless cars were purchased at the super competitive price, unless the parts were sold no one would have been injured. So, first of all, this is not just a bid-rigging conspiracy, we allege that bid rigging --

THE COURT: Alleged price fixing.

MR. PERSKY: Price-fixing conspiracy, that's one major distinction. And, two, it is the sales that cause the injury. The fact that the contract is awarded doesn't hurt the consumer, it doesn't hurt anyone else until something occurs that results in somebody overpaying. So the cause of action was not complete in the conspiracy that we allege until sales were made. That's our contention, Your Honor.

THE COURT: Okay.

MR. PERSKY: We further contend that as under the O'Lockland (phonetic) County of Orange case in the Ninth Circuit, a fresh start after the bankruptcy discharge does not provide, quote, a continuing license to violate the law, unquote.

And we think the Lower Lake Erie case is on point, and that what happened to Conrail is, yes, they bought these

railroads pursuant to the Railroad Reorganization Act but for whatever reason they chose to join a preexisting antitrust conspiracy and by joining that conspiracy after they bought these railroads, which were in essence bankrupt railroads, the court said they could be liable for the full scope of the conspiracy including the activities of those railroads that it purchased for the whole 22-year period of the conspiracy.

Similarly, if we are correct, and we believe we are, that we have pleaded posteffective date unlawful conduct, we believe that under antitrust and conspiracy law principles Lear not only would be liable for the damage it caused posteffective date, it would be jointly and severally liable for the damages caused during the entire period of the conspiracy, early through its own act preeffective date and/or because of the unlawful activity of its co-conspirators preeffective date.

So Lear is not here because they happen to be passing by an industry that is under investigation. One, they are under investigation; two, they partnered with a felon; and, three, we allege that they profited from that activity by making sales of wire harnesses at super competitive prices posteffective date and indeed preeffective date.

I would be happy to answer any questions the Court may have. Thank you.

THE COURT: A lot of questions. All right. Reply, or is there anything else from -- no.

MR. FINK: The directs are done.

THE COURT: Mr. Marovitz?

MR. MAROVITZ: Thank you, Your Honor.

THE COURT: How about this plea again? Let's go back to the joint venture plea. It wasn't the entity, it was the person, right, in that --

MR. MAROVITZ: I would love to go back there. Let's take a look in particular at paragraph 96 of the automotive dealers' consolidated class complaint, which alleges quite clearly that this -- I mean, Mr. Persky keeps referring to it as a joint venture, but the pleading is, and I quote, defendant Furukawa Wiring System America, Inc., Furukawa Wiring, is a Delaware corporation with its principal place of business in El Paso, and then it describes the way in which the percentage ownership has changed and it says in April of 2009 Furukawa purchased an additional 60 percent of the joint venture raising its stake to 80 percent and changed the joint venture's name to Furukawa-Lear Corporation. So before the bankruptcy -- before the bankruptcy this Delaware corporation had two shareholders, my client Lear owned 20 percent of it, it was not a partnership, it was not a loosey-goosey joint venture, it is a Delaware corporation. And now the Court understands why I spent so much time at the

beginning with the Iqbal slide and talking about the reason that plaintiffs are not allowed to give conclusory allegations and formulate recitations about things that just aren't. This is a Delaware corporation, they pled it as a Delaware cooperation.

To answer your question, Judge, this Delaware corporation never pled guilty. All right. So I really don't know when the plaintiffs say that we somehow associated with a felon what they mean. It is true that Furukawa, a separate company, pled guilty. It is also true that this corporation, this Delaware corporation that I have listed there, is separately represented. I'm not representing them. That's a different company.

THE COURT: Wait a minute. Furukawa pled guilty?

MR. MAROVITZ: Correct, one of the Furukawa entities. I don't want to -- there is a Furukawa entity that pled guilty.

THE COURT: An entity, not an individual?

MR. MAROVITZ: Correct.

THE COURT: And it was the partner -- I don't want to say partner if it is a corporate structure.

MR. MAROVITZ: So a Furukawa entity was a shareholder --

THE COURT: With Lear?

MR. MAROVITZ: -- with Lear.

Before the bankruptcy the Furukawa entity owned 80 percent, so Lear had a small 20-percent stake in this corporation, and this corporation did not plead guilty, I can't emphasize that enough. The Furukawa entity that pled guilty is a separate corporation, separately represented, the joint venture/corporation -- plaintiffs keep calling it a joint venture but they plead that it is a corporation. They are separately represented. I don't represent them. Lear doesn't own them anymore. If there ever were a case where it was clear that a defendant was being roped into the case as a result of guilt by association, Mr. Persky's argument makes that perfectly clear here, that's the only reason that we are here.

And when the Court asked what is it that Lear did, all we kept hearing about was, well, they continued to make sales; well, they associated with somebody who pled guilty. What is it that Lear did in the first instance? What meeting did it attend? What agreement did it reach? All we have are the things that are on that chart, those three things; guilty by association, one; guilty by association, two; and sales, which everybody does. We are here because we make wire harnesses, that's why we are in this case.

I also want to clarify one point that Mr. Persky made about the investigation in Europe. Mr. Persky said that Lear was under investigation in Europe, and I thought I had

mentioned in my original presentation, and we certainly mention in our reply brief at page 7, and also we showed at Exhibit A, that Lear is not being pursued in Europe. Okay. We are not under investigation any longer in Europe. The fact is that in Europe when there are investigations the equivalent to a charging document here like an information or an indictment is called a statement of objections. That's what the European Commission brings. It is essentially a complaint. It is much more complicated than that.

I don't want to go through -- I'm not an expert, I'm not a European lawyer, but what they do is they prepare a statement of objections and those are essentially objections against certain conduct and then those objections have to be proven much as they might be proven in this country. Here the European Commission has said that it is not filing a statement of objections against Lear Corporation, so for plaintiffs to stand up and say well, you were under investigation before and not to mention the fact that there is no statement of objections that has been filed against us, is arguing the exact opposite of what Mr. Kohn argued this morning on how important it was that a judicial officer would look at and would sign a warrant on how important it was that there were guilty pleas. Here the investigation apparently was done in Europe and not pursued against Lear, that has to be at least as, if not more, important.

THE COURT: Is there anything that comes out of the European investigation that confirms what you said, there will be no objections filed or there will be --

MR. MAROVITZ: The best we can do for now, Judge, is what we did was we attached to our reply brief at Exhibit A a statement from the European Commission, it is a press release, and on page 2 of Exhibit A in the fourth paragraph -- could I hand it up, would that be helpful?

THE COURT: I know what you are talking about.

MR. MAROVITZ: Okay.

THE COURT: It is a press release.

MR. MAROVITZ: Yes. It says the Commission has informed the companies and the competition authorities of the member states that it has opened proceedings in this case. Lear Corporation has not been informed and as a result there are no proceedings against it.

THE COURT: Okay. Thank you.

MR. MAROVITZ: In addition, I do need to correct one point. Mr. Rossiter, the then CEO of the company, not only explained as a result of being under investigation like a lot of people and therefore giving notice as may be required under certain security laws but he also said we have done nothing wrong. And, I mean, that's -- the fact is that Mr. Rossiter's statement was borne out by what the European Commission did with respect to Lear. It is not pursuing a

statement of objections as against Lear.

Final point that I guess I would make, Your Honor, is I don't agree but I don't think we ever need to reach that issue as to what the scope of joint and several liability is for past acts, et cetera. You only reach this final issue, this sales issue, you only reach that if you find that they properly pled some misconduct by Lear. Otherwise it is just a sale like everybody else's. The fact is Your Honor asked plaintiffs what it is that Lear did, and they said, well, they fraternized essentially with somebody who pled guilty in a joint venture even though it was a corporation, and they made sales. This original list of sales that I put up as to specific allegations and is contained in the demonstratives, the plaintiffs haven't identified anything else despite given the opportunity to do so in their poor delivery. This is it, and this is not enough under Twombly.

THE COURT: Thank you.

MR. PERSKY: Your Honor, I just want to correct one statement after Mr. Marovitz sits down. He has confirmed, as I said, that Lear was under investigation by a European authority, I didn't say they were charged with anything. The fact that they have been and either are under investigation lends plausibility to our allegation that they are -- they participated in the conspiracy.

With respect to the joint venture he quoted from

the auto dealers' complaint. I would like to quote from our complaint, paragraph 91 of the consolidated amended complaint of the end payors, about paragraph 91, Defendant Furukawa Wiring Systems America, Inc., formerly known as Furukawa-Lear Corporation, and Lear-Furukawa Corporation (Furukawa Wiring) is a Delaware corporation with its principal place of business in El Paso, Texas. Defendant Furukawa Wiring is 60 percent owned by Furukawa Electric and 40 percent owned by American Furukawa. During the class period Furukawa Wiring operated as a joint venture between Lear Corporation and Furukawa Electric that manufactured, distributed or sold wire harness products in the United States. In June 2010 Furukawa Electric purchased all of Lear's remaining interest. We expressly plead that Lear was in a joint venture with Furukawa and operated it as a joint venture, and then we cite in our brief cases that say with respect to a joint venture between two entities if that joint venture operates unlawfully the joint venturers are liable for the unlawful conduct.

THE COURT: But are you saying that the -- the joint venture is not the company that was a Delaware company?

MR. PERSKY: It is a Delaware company but we allege that it was operated as a joint venture, not as some corporation with shares owned by one person and shares owned by another person. In essence what we are trying to allege

here it was operated as a form of joint venture like a partnership, the two joint venturers were Lear and --

THE COURT: How is it that they disregarded the corporate structure, what is it that they did that disregarded the --

MR. PERSKY: They jointly operated the company together and operated as a joint venture. That's the intent of the allegation. We believe that by making that allegation we come within the case of finding joint venturers liable. Now, do we say that is an open and shut argument? No. We say that it lends plausibility to including Lear amongst those sued for this wire harness conspiracy. One, they are under investigation in Europe for wire harness sales; two, they partnered within a joint venture with a company that admitted that it was guilty of price fixing of wire harnesses; and, three, we say they made posteffective date sales.

THE COURT: Let me met ask you this question again. What did they do to show it was a joint venture versus a corporate structure?

MR. PERSKY: We allege that it was operated as a joint venture.

THE COURT: I know you allege, that's a conclusion it is operated as a joint venture. What did they do to show that it operated as a joint venture?

MR. PERSKY: I wanted to make it clear that when they -- when Mr. Marovitz quoted from the dealers' complaint that it is just a corporation, we went further than that and said no, the two entities that owned that corporation operated it as a joint venture. What did they do? They sold wire harnesses at super competitive prices, the joint venture did. That's what we allege. Based on that, we say since Lear was part of that joint venture as a joint venturer it could be held liable under the joint venture cases. That's -- we are not hanging our hat just on that, we believe that adds plausibility to including Lear among those named as defendants here.

THE COURT: All right. Anything else?

MR. MAROVITZ: No. Thank you, Your Honor.

THE COURT: All right. Thank you. What else do we have? What else do we have today? That's it.

Okay. We are done for today. Tomorrow morning I want to -- I think we had said 10:00 but I would ask that you come at 9:30 because there is -- we just have so many things going on at the courthouse the doors are going to be jammed again but 9:30 seems to be a window of opportunity, so let's try that. Okay. All right. Thank you. We will see you tomorrow morning.

(Proceedings concluded at 3:07 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In Re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Wednesday, December 5, 2012.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 12/14/2012

Detroit, Michigan